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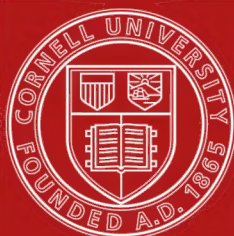
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A
TREATISE
ON THE
LAW OF HOMICIDE
IN THE
UNITED STATES:
TO WHICH IS APPENDED

A SERIES OF LEADING CASES ON HOMICIDE, NOW OUT OF PRINT,
OR EXISTING ONLY IN MANUSCRIPT.

BY

FRANCIS WHARTON,

AUTHOR OF "A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES," "PRECEDENTS OF
INDICTMENTS AND PLEAS," "STATE TRIALS OF THE UNITED STATES," ETC.

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P R E F A C E .

I MAKE claim to very little originality in this book, excepting so far as relates, (1) to those parts which are peculiar to the criminal law of the United States, (2) to the condensed view of the civil law in relation to criminal evidence given towards the close, and (3) to the general arrangement and analysis of the subject-matter. The leading English cases have indeed received from English text-writers so authoritative a discussion, and have been for a long time invested with glosses and adjusted in relations to which the professional opinion has been so entirely reconciled, that it would have been presumptuous in me to have subjected them, so far as the common law is concerned, to a fresh review. I have, therefore, in transferring them to my own pages, taken them in the language and with the commentary of Mr. East and Sir W. Russell, the most copious and faithful, if not the most philosophic, of the English authorities on this branch of jurisprudence.

So far as concerns the American portions of the following pages, they will speak for themselves. I cannot, however, omit here to express the acknowledgments which I feel are due to a great master of criminal law, whose labours in that field, I fear, are now closed. EDWARD KING was president of the Court of Common Pleas in Philadelphia from 1826 to 1852, during which period the entire criminal practice of that jurisdiction, with very few exceptions, passed under his supervision, and was moulded by his hands. By him the accepted exposition of the statute discriminating murder into two degrees, was first framed; and wherever, in the numerous States

in which that statute has been adopted, the learning of that branch of homicide is considered, it is upon his simple and yet most luminous commentary on that once vexed question, that both counsel and courts finally repose. Of the same manly and just power of comprehension and perspicuousness of style, the charges and opinions, at the close of this volume, on Riotous Homicide, may be taken as still more signal illustrations; and I am glad to have the opportunity of saying now, what I was unwilling to say at the time of its publication when Judge King was on the bench and in the meridian of his intellectual faculties and reputation, that whatever credit the first edition of my work on Criminal Law is entitled to, is due in part to his opinions, which were interspersed in its pages, but chiefly to the general tone of sentiment I gathered from him during a period of two years in which I occupied an official position which brought me in constant intercourse with him while in the exercise of his judicial functions. Ten years have passed since then; many changes have taken place; in the vicissitudes of life, particularly of judicial life, new objects of official respect and personal admiration have arisen before the bar; before another opportunity like the present would enable me to speak, death itself might come in to close the power of the one to hear or the other to tender such a tribute as the present; and I am admonished therefore to take this moment of recording my acknowledgments, and, as I conceive, those of all who are interested in the administration of penal justice, to a judge who, I think, has done more than any other living man to establish in our midst a wise, liberal and humane system of criminal jurisprudence. If in the present volume I have contributed anything towards bringing such a system more fully before the professional eye, my labours will be amply rewarded.

F. W.

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E R R A T A .

P. 112, after note 1, add, "see also, U. S. v. Collyer, Appendix, 483; U. S. v. Taylor, Wh. Cr. Law, (3d ed.) p. 416."

P. 129, note 5, for "6" C. & P. read "7" C. & P.

P. 187, note 1, 25th line from bottom, for "executed," read "excusable."

P. 245, after first line of note 3, add, "though see Wh. Cr. Law, 3d ed. 294, where this point is reviewed."

P. 249, 8th line from bottom, after "great," insert "latitude in the." Note 4, insert "215" before "216, 217."

P. 286, note 1, 3d line from bottom, read "2 Strob," instead of "2d Stroth."

P. 310, text, 12th line from bottom, insert "in Tennessee" at beginning of line.

P. 345, Dele lines 31 and 32, (III. IV.)

P. 361, note 1, for "69 Connect," read "19 Connect."

P. 481, text, 17th line from top, for "writs," read "riots."

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HOMICIDE.

CHAPTER I.

GENERAL CLASSIFICATION AND DEFINITION.

HOMICIDE, at common law, is technically divided into the following heads:—

- I. Murder.
- II. Manslaughter.
- III. Excusable homicide.
- IV. Justifiable homicide.

I. MURDER.

Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the commonwealth, with malice prepense or aforethought, either express¹ or implied.²

The distinguishing feature in this definition, as will at once be seen, is that of *malice*. By this term, at common law, is meant to include not only special malevolence to the individual slain, but a generally wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent on mischief.³ And, in general,⁴ says Sir Wm. Russell, any formed design of doing mischief may be called malice; and, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder.⁵

Malice is *express* or *implied*. When one person kills another with a sedate deliberate mind and formed design, it is said to be *express*. Of this the usual evidence is circumstantial, such, for instance, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm; and, in general, any deliberate cruel act committed by one person against ano-

¹ Wh. C. L. (2d ed.) 357.

² Com. v. Thomson, 5 Mass. 134; 3 Wheeler's C. C. 319; State v. Zeller, 2 Halsted, 220; State v. Norris, 1 Hay. 429; State v. Weaver, 2 Hay. 54; Com. v. Daley, 4 Penn. Law Jour. 154; Penns. v. Honeyman, Add. 148; 3 Inst. 47, 51; 2 Ld. Raymond, 1487; 1 Hale, 425; 1 Hawk. ch. 31, s. 3, 8; Kel. 127; Fost. 256; 4 Blac. Com. 198; Lewis, C. L. 394.

³ Fost. 256, 262.

⁴ 1 Hawk. P. C. c. 31, s. 18; Fost. 257; 1 Hale, 451 to 454; 1 Russell on Crimes, 483.

⁵ 1 Hale, 451; 4 Blac. Com. 199.

ther, however sudden;¹ as where a man kills another suddenly without any, or without a considerable provocation,² and where a man wilfully poisons another.³ And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief.⁴

Where the act is committed deliberately, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural or probable effect of any act deliberately done, is intended by its actor.⁵ The killing proved, even though nothing else be shown, it has been repeatedly held in Massachusetts that the offence is murder; the burden of extenuation being then thrown on the defendant;⁶ and such is undoubtedly the general rule.⁷ In Ohio the presumption of killing alone is that of murder in the second degree,⁸ and so also is held to be the law in Virginia.⁹ In the latter state, however, it is said that where the mortal wound is given with a deadly weapon in the slayer's previous possession, there being no evidence of provocation, the case is *prima facie* murder in the first degree;¹⁰ and so also is the rule in Pennsylvania.¹¹

Malice, once ascertained, is presumed to continue down to the fatal act.¹² Thus, where it appeared that the deceased had threatened the prisoner about three weeks before that he would kill him, that they met in the street on a star-light night when they could see each other, that the deceased pressed for a fight, but the prisoner retreated a short distance, that when the deceased overtook him, the prisoner stabbed him with some sharp instrument which caused his death, and

¹ 1 East, P. C. c. 5, s. 2, p. 215.

² U. S. v. Cornell, 2 Mason, 91; State v. Smith, 2 Strobb. 77; Com. v. Drew, 4 Mass. 391; Res. v. Bob, 4 Dallas, 146; Penn. v. Honeyman, Addison, 148; Penn. v. McFall, Id. 257; Penn. v. Lewis, Id. 282; Com. v. York, 7 Boston Law Report, 510; State v. Zeller, 2 Halsted, 220; State v. Merrill, 2 Dev. 269; People v. McLeod, 1 Hill's N. Y. R. 377; State v. Town, Wright, 75; State v. Irwin, 1 Hay. 112; State v. Peters, 2 Rice's Dig. 106; State v. Town, Wright, 75; State v. Turner, Ibid. 20; Woodsides v. State, 2 Howard's Miss. R. 656; Dexter v. Spear, 4 Mason, 115; People v. McLeod, 1 Hill, 577; State v. Town, Wright, 75.

³ 1 Hale, 455; 4 Blac. Com. 200.

⁴ 1 Hale, 474; 1 Hawk. P. C. c. 29, s. 12; 4 Blac. Com. 200; 1 East, P. C. c. 5, s. 18.

⁵ State v. Tookey, 2 Rice's Dig. 104; U. S. v. Cornell, 2 Mason, 91; Woodsides v. State, 2 Howard's Miss. R. 656; Davies v. State, 2 Humphrey, 437; Coffee v. State, 3 Yerger, 288; The State v. Lipsey, 3 Dev. 485.

⁶ Com. v. York, 9 Met. 93; Wilde, J. diss. Bemis' Webster's case, p. 451; Mitchell v. State, 5 Yerg. 340.—Though see Coffee v. State, 3 Yerg. 283.

⁷ 1 Rus. on Cr. 483; Woodsides v. State, 2 Howard, 656; Hill's case, 2 Gratt. 594; State v. Smith, 2 Strobb. 77; People v. McLeod, 1 Hill, 177; Rex v. Greenacre, 8 C. & P. 35, per Tindal, C. J., 4 Bl. Comm. 200, York's case, 9 Met. 193. Such is also the rule in Scotland, Alison's Crim. Law of Scotland, 48, 49. It also seems to be the rule of the Roman Civil Law. *Omne malum factum prave semper præsumitur actum; nisi ratione personæ contraria omnino oriatur præsumptio.* De Probat. Concl. 223 in 5. *Si homicidium committatur, præsumitur in dubio doloso committi, licet potuisset patiari ad defensionem.* Id. concl. 1007, n. 62. *Omne malum præsumitur pessimi, factum nisi probetur contrarium.* Id. concl., 1163, n. 23.

⁸ State v. Turner, Wright, 20.

⁹ Hill's case, 2 Gratt. 594.

¹⁰ Ibid.; See also M'Daniel v. State, 8 S. & M. 401; State v. Hildreth, 9 Iredell, 429; Pierson v. State, 12 Ala. 149.

¹¹ Smith's case; Dougherty's case, appendix.

¹² State v. Johnson, 1 Iredell, 354; State v. Tully, 4 Iredell, 424.

at the time of this meeting, the deceased had no deadly weapon; it was held, that in such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencontre, that the killing was in self-defence, the presumption being that the killing was malicious.¹

Malice may be exerted against a party in his absence; as where A lays poison for B in his victuals, which B afterwards takes and dies. So, where A procures an idiot or lunatic to kill B, which he does. In both instances A is guilty of the murder as principal.²

There may be a class of cases, to use the words of Chief Justice Shaw, "when, if reasonable doubt arises as to the malice, the court would properly instruct the jury to find manslaughter, as where a mother exposed her infant child in a garden, and it was devoured by a kite, or where the death of a pauper was produced by constant shifting, on the part of the overseers of the poor, from parish to parish."³

II. MANSLAUGHTER.

Manslaughter is the unlawful and felonious killing of another, without any malice, either express or implied.⁴ Manslaughter differs from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionably lenient.⁵

It is no defence to an indictment for manslaughter, that the homicide therein alleged, appears by the evidence to have been committed with malice aforethought, and was, therefore, murder; but the defendant, in such case, may, notwithstanding, be properly convicted of the offence of manslaughter.⁶

Manslaughter at common law is of two kinds: 1st. Voluntary manslaughter, which is the unlawful killing of another, without malice, on sudden quarrel or in heat of passion. Where upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so, if they, upon such occasion, go out and fight in a field; for this is one continued act of passion. So also if a man be greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendendo*; neither is it murder, for there is no previous malice. In these, and such like cases, the law kindly appreciating the infirmities of human nature, extenuates the offence committed, and mercifully hesitates to put on the same footing of guilt, the cool deliberate act, and the result of hasty passion.

2nd. Involuntary manslaughter, where a man doing an unlawful act, not amounting to felony, by accident kills another. It differs from

¹ State v. Scott, 4 Iredell, 409. ² Wh. C. L. (2d. ed.) 62. ³ Com. v. York, 9 Met. 93.

⁴ 1 Hale, 449; 1 Hawk. c. 30, s. 3; Parker, J., Selfridge's trial, 158; State v. Norris, 1 Hay. 429.

⁵ Exparte Tayloe, 5 Cowen, 51; King v. Com. 2 Va. Cases, 78; Com. v. Bob, 4 Dall. 125; State v. Tookey, 2 Rice, S. C. Dig. 104; Penn. v. Levin, Addison, 279; State v. Travers, 2 Wheeler's C. C. 506; Com. v. Mitchell, 1 Va. Cases, 716; Parker, J., Selfridge's trial, 158; 1 Hale, 449, 450, 466; 3 Inst. 55; 1 Hawk. c. 30, s. 2; vide R. v. Mawgridge, Kel. 124; Fost. 290; vide Lord Cornwallis's case, Dom. Proc. 1678; 2 St. Tr. 730.

⁶ Commth. v. M. Pike, 3 Cush. 181.

homicide excusable by misadventure in this: that misadventure always happens in the prosecution of a lawful act, but this species of manslaughter in the prosecution of an unlawful one. Where a person does an act lawful in itself, but in an unlawful manner, this excepts the killing from homicide excusable *per infortuniam*, and makes it involuntary manslaughter. In general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it; if it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it is manslaughter.¹

III. EXCUSABLE HOMICIDE.

Excusable homicide is of two kinds:—1st. Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as, for instance, where a man is hunting in a park, and unintentionally kills a person concealed. This is called homicide *per infortuniam*, or by misadventure. 2d. *Se defendendo* or in self-defence, which exists, (to adopt the definition of Mr. Greenleaf,²) where one is assaulted upon a sudden affray, and in the defence of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant. To reduce homicide, in self-defence, to this degree, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. The jury, as will presently be seen more fully, must be satisfied that, unless he had killed the assailant, he was in imminent and manifest danger either of losing his own life or of suffering enormous bodily harm.³ By the older text writers, this species of homicide is sometimes called *chance medley* or *chaud medley*, words of nearly the same import; and closely borders upon manslaughter. In this case as well as in that of manslaughter, the theory is, that passion has kindled on each side, and that blows have passed. The distinction, however, is that, in manslaughter, it must appear either that the parties were actually in mutual combat when the mortal stroke was given, or that the slayer was not at that time in imminent danger of death; but that in homicide excusable by self-defence, it must appear, either that the slayer had not begun to fight, or that, having begun, he endeavoured to decline any further struggle, and afterward being closely pressed by his antagonist, he killed him, to avoid his own destruction.⁴ As will in another chapter be explained more fully, the same right of self-defence is extended to the relations of master and servant, parent and child, and husband and wife; and to those cases where homicide is unavoidably committed in the defence of the possession of one's dwelling-house, against a trespasser, who, having

¹ 4 Bl. Com. 191.

² 3 Greenleaf Ev. § 116.

³ 4 Bl. Comm. 182; 1 Russ. on Crimes, 660, 661; Whart. Am. Crim. Law, 385, 397. Qui cum, aliter tueri se non possant, damni culpam dederint, innoxii sunt. Vim enim vi defendere omnes leges omniaque jura, permittant. Dig. lib. 9, tit. 2, l. 45, § 4. Is, qui aggressorem vel quemcunque alterum in dubio vitæ discrimine constitutus occiderit, nullam ob id factum calumniam metuere debet. Cod. lib. 9, tit. 16, l. 2.

⁴ 4 Bl. Comm. 184; 1 Russ. on Crimes, 661; State v. Hill, 4 Dev. & Batt. 491.

entered, cannot be put out otherwise than by force; and where no more force is used and no other instrument or mode is employed than is necessary and proper for that purpose. Under the same general head of excusable homicide may also be enumerated that class of cases, where two persons are reduced to the alternative, that one or the other or both must certainly perish, as, where two shipwrecked persons are on one plank which will not hold them both, and one thrust the other from it, so that he is drowned, the survivor is excused.

The distinction, in result, between justifiable and excusable homicide is now practically exploded. In former times, in the latter case, as the law presumed that the slayer was not wholly free from blame, he was punished, at least by forfeiture of goods. But in this country, this rule is not known ever to have been recognised; it having been the uniform practice here, as it now is in England, where the grade does not reach manslaughter, for the jury under the direction of the court to acquit.

IV.—JUSTIFIABLE HOMICIDE.

*Justifiable homicide*¹ is that which is committed, either,—1st. By unavoidable necessity, without any will, intention or desire, or any inadvertence or negligence in the party killing, and, therefore, without blame; such as, by an officer, executing a criminal, pursuant to the death warrant, and in strict conformity to the law, in every particular; or, 2dly. For the advancement of public justice; as, where an officer in the due execution of his office, kills a person who assaults and resists him; or where a private person or officer attempts to arrest a man charged with felony and is resisted, and in the endeavour to take him, kills him; or if a felon flee from justice, and in the pursuit he be killed, where he cannot otherwise be taken; or, if there be a riot, or a rebellious assembly, and the officers or their assistants, in dispersing the mob, kill some of them, where the riot cannot be otherwise suppressed; or, if prisoners, in jail or going to jail, assault or resist the officers, while in the necessary discharge of their duty, and the officers or their aids, in repelling force by force, kill the party resisting; or, thirdly, for the prevention of any atrocious crime, attempted to be committed by force; such as murder, robbery, house-breaking, in the night time, rape, mayhem, or any other act of felony against the person.² But in such cases, the attempt must be not merely suspected, but apparent, and the danger must be imminent, and the opposing force or resistance necessary to avert the danger or defeat the attempt.³

¹ The above definition is taken from Mr. Greenleaf, (3 Green. on Evid. 115,) who refers to 4 Bl. Comm. 178—180; 1 Russ. on Crimes, 665, 670; Whart. Am. Crim. Law, 299. The Roman civil law recognised the same principles. Qui latronem (insidiatorem) occiderit, non tenetur, utique si aliter periculum effugere non protest. Inst. lib. 4, tit. 3, § 2. Furem nocturnum, si quis occiderit, ita demum impune feret, si parcere ei sine periculo suo non potuit. Dig. lib. 48, tit. 8, l. 9. Qui stuprum sibi vel suis per vim inferentem occidit, dimmittendum. Dig. lib. 48, tit. 8, l. 1, § 4. Si quis percussorem ad se venientem gladio repulerit, non ut homicida tenetur; quia defensor propriæ salutis in nullo peccasse videtur. Cod. lib. 9, tit. 16, l. 8. In the cases mentioned in the text, if the homicide is committed with undue precipitancy, or the unjustifiable use of a deadly weapon, the slayer will be culpable. See Alison's Crim. Law of Scotland, p. 100; Id. p. 132—139.

² United States v. Wiltberger, 3 Washburn, 515. And see State v. Rutherford, 1 Hawks, 457; State v. Roane, 2 Dev. 58.

³ 4 Bl. Comm. 182; 1 Russ. on Crimes, 657—660.

CHAPTER II.

HOMICIDE FROM INDIVIDUAL MALICE.

I. TOWARDS the party killed.

II. Towards a third party, when the fatal blow falls on the deceased by mistake.

I.—TOWARDS THE PARTY KILLED.

Malice may be either *express* or *implied* by law. Express malice is defined to be when one person kills another with a sedate deliberate mind and formed design. Such formed design may be evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden: thus where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. And, as will be seen presently, where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such a depraved inclination to mischief. It may indeed be treated as a general rule, that all homicide is presumed to be malicious where an instrument likely to cause death is used.¹

It should not be forgotten in this connexion, that the legal meaning of the term *malitia* or malice is different from its popular meaning, which makes it synonymous with spite. Thus Lord Holt says, "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact; which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy, hatred, and malice*, are three distinct passions of the mind."² Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it³ as "*versuta et fallax nocendi ratio*;" and in another work⁴ he says, "*mihi quidem etiam veræ hæreditates non honestæ videntur si sint malitiosis (i. e. according to Pearce, a malo animo profectis) blanditiis officiorum; non veritate sed simulatione quæsita.*" And in the Pandects⁵ in speaking of a banker or cashier giving his accounts, it is said, "*Ubi exigitur argentarius rationes*

¹ Wh. C. L. 360. See ante p. 34.

⁴ De Offic. Lib. 3 s. 18.

² Kel. 127.

³ De Nat. Deor. Lib. 3, s. 30.

⁵ Dig. Lib. 2 Tit. 13, Lex. 8.

edere, tunc punitur cum dolo malo non exhibet Dolo malo autem non edit, et qui malitiose edidit, et qui in totum non edit." At common law, malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam* says, "If one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a *just cause*."¹ And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus where the 25 Hen. 8, c. 3, says, that persons arraigned of petit treason, &c., standing "mute of malice or froward mind," or challenging, &c., shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1, *De malefactoribus in parvis*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but "*immo malitiam suam prosequendo et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been, (as will be seen in the course of the present and subsequent chapters) whether the act were done with or without just cause or excuse; so that it has been suggested that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*. Malice, in its legal sense, denotes a wrongful act done intentionally or without just cause or excuse.

Malice in this intent may be considered under the following heads:—

- (1.) Intent to kill.
- (2.) Intent to do bodily harm.

(1.)—INTENT TO KILL.

This head admits of no question in its primary sense. Of course, where there is a deliberate intent to kill, unless it be in the discharge of a duty imposed by the public authorities, the offence must be murder at common law.² And it should be observed that an intermediate provocation, immediately after the happening of which the offence occurred, forms no defence.³ The reason of this is obvious, for if all that was necessary for a man to do to relieve himself from the guilt of murder was such provocation, there would rarely be a case of homicide without it. In a leading case on this point, the prisoner, with the deceased and another brother, and some neighbours, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgel by agreement. All this time no token of anger appeared on either side, till the prisoner, in the cudgel-play gave the deceased a smart blow on the tem-

¹ 2 Inst. 384.

² See Wh. C. L. 2d ed. 361.

³ Ibid. 1 Rus. on Crimes, 515.

ple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest: but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reproved for using such expressions, he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body." The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him in to the company: but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you, stand off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case showed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon: but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off; but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second; but he advanced as fast, and took the revenge he had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the death, did not alter the case; nor did the preceding quarrel; because all circumstances considered he appeared

to have returned with a deliberate resolution to take a deadly revenge for what had passed.¹

Malice can never, or rarely, be directly proved, and the evidence of it, therefore, being circumstantial, any facts which go to afford an inference of its existence are admissible. Illustrations of this are found under a previous head; and in the subsequent consideration of murder in the first and second degrees, the subject will be further noticed. But it would seem that the malice proved must be directed to the particular act for which the prisoner is tried, as otherwise the issue might become much encumbered. Thus it was held in Tennessee, that on the trial of an indictment for murder, evidence that the prisoner, a short time before the murder, had set fire to the house of the deceased in the night time, was inadmissible for the purpose of proving that the prisoner had committed the murder.² Where, however, there is established a settled purpose of revenge on the part of the prisoner, such evidence would seem to be admissible if it appeared to be one of the manifestations of such spirit.

Evidence that the prisoner had beaten his wife, and forced her to abandon his house, and seek refuge under the protection of the deceased, has been held proper proof of malice prepense on the part of the prisoner.³

Malice of this kind, it is well stated by Mr. Greenleaf, may be shown from the circumstances attending the act, such as the deliberate selection and use of a lethal weapon, knowing it to be such; a preconcerted hostile meeting, whether in a regular duel, with seconds, or in a street fight mutually agreed upon, or notified and threatened by the prisoner; privily lying in wait; a previous quarrel or grudge; the preparation of poison, or other means of doing great bodily harm, or the like."⁴

(2.)—INTENT TO DO BODILY HARM.

At common law, the intent to do bodily harm, followed up by homicide, constitutes murder; though, as will be seen hereafter, such an offence falls in this country, in those states where this distinction exists, under the head of murder in the second degree. Homicides of this character are numerous; and it is easy to suppose of homicide in a duel that may be so ranked, *e. g.*, where the intention was to *maim*, not to *kill*. The distinction, in a case of this kind, is undoubtedly very delicate; and when a statutory line must be drawn, it would perhaps be wiser to say that when the damage intended was such as would probably result in death, it is murder in the first degree, even though death may have been but incidental to the offender's purpose.⁵ Although A intend only to *beat* B in anger, from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequences. He beat B with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did.⁶ So if a large stone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it

¹ Mason's case, Fost. 132. 1 East. P. C. c. 5, s. 23, p. 239.

² Stone v. State, 4 Humph. 27.

³ Stone v. State, 4 Humph. 27.

⁴ 3 Greenleaf on Ev. s. 145.

⁵ Com. v. Green, 1 Ashm. 289.

⁶ Fost. 259.

kill him, or any other, this is murder.¹ But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases.

In a more recent case, it appeared that the deceased, being in liquor, had gone at night into a glass house, and laid himself down upon a chest; and that while he was there asleep the prisoners covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly; the consequence of which was that the straw ignited, and he was burnt to death: there was no evidence of express malice, but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with any thing short of design. Patterson, J., adverted to the fact of there being no evidence of express malice, but told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter.

The character of that species of homicide which arises from unlawful assemblages will be considered in another chapter.

II.—TOWARDS A THIRD PARTY, WHEN THE FATAL BLOW FALLS ON THE DECEASED BY MISTAKE.

Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter. For if a blow, intended against A, and lighting on B, arose from a sudden transport of passion, which, in case A had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation if it shall have caused the death of B.² And on the same principle A having malice against B, strikes at and misses him, but kills C, this is murder in A; and if it had been without malice and under such circumstances that if B had died, it would have been but manslaughter; the killing of C also would have been but manslaughter.³ Again, A having malice against B, assaults him, and kills C the servant of B, who had come in aid of his master: this is murder in A; for C was justified in attacking A in defence of his master who was thus assaulted. In another case if A gave a poisoned apple to B, intending to poison her, and B, ignorant of it gave it to a child, who took it and died; this is murder in A, but no offence in B; and this, though A who was present at the time endeavoured to dissuade B from giving it to the child.⁴ So where Plummer, and seven others, opposed the king's officers in the act of seizing wool. One of those persons shot off a fusee and killed one of his own party. The court held, in giving judgment upon a special verdict, that as the prisoner was upon an unlawful design, if he had in pursuance thereof discharged the fusee against any of the king's officers that came to resist him, in the prosecution of that design, and by accident had killed

¹ 1 Hale, 491.

² Fost., 262.

³ 1 Hale, 379, 439, 466; Dyer, 128; Kel. 111, 112, 117; Pult de Pace, 124, b; Fost., 261; 1 Hawk., c. 31, 542; *State v. Cooper*, 1 Green, N. J. R.; *State v. Benton*, 2 Dev. and Bat. 196.

⁴ 1 Hale, 280; 2 Plowden Com. 474.

one of his own accomplices, it would have been murder in him. As if a man out of malice to A shoot at him, but miss him and kill B, it is no less a murder than if he had killed the person intended.¹ And again, where the prisoner fired a loaded pistol at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball hit another person and killed him, it was held that the crime was murder.²

If a man have a sudden quarrel, and fight with A, by which his passions are strongly excited, and while his passions are thus excited, he without any real or supposed provocation kill B, who is an utter stranger to the whole affair, and has not interfered in the quarrel, nor been in any way connected therewith, even in the party's own supposition, it will be murder.³ But, where the prisoner, having had a quarrel with his wife, and aimed a blow at her with an axe, which fell on the head of his infant son, then in her arms, by which he was instantly killed, it being shown that the prisoner was ignorant of his child's position, and was at the time in the heat of blood, seeking to avenge himself on his wife for a supposed injury, it was held that as the case was to be considered as if the wife had been the victim, the same grade of homicide would attach to the killing of the child as it would have done to that of the wife, if she had been killed.⁴ But in this as in cases of malice prepense and express, if the blow intended for one would in law have amounted to manslaughter, it will still be the same, though by mistake or accident it kill another. Thus, in an old case, a quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier who had before driven a part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him he struck at them with the flat-side, and as they fled pursued them. The other soldier in the meantime had got away, and when the prisoner returned he asked whether they had murdered his comrade; and being several times again assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed the prisoner went up to him and struck him on the head with the sword, of which he presently died. This was holden manslaughter: it was not murder, because there was a previous provocation, and the blood was heated in the contest: nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner.⁵

A widow, finding that one of her sons had not prepared her dinner, as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a pas-

¹ 12 Mod. 627; Kelyng, 111; Lord Raym. 1581; 9 St. Tr. 112; Higgins' case, Dyer, 128; Pl. 60; Crompt. 101; Pl. 474; 9 Co. 81, Agnes Gore's case; D. Williams' case, cited in the Queen v. Maugridge, Kelyng 131, 132; 9 St. Tr. 61.

² State v. Smith, 2 Strobb., 77.

³ U. S. v. Travers, N. Y. Cir. Court, 2 Wheeler's C. C., 508.

⁴ Com. v. Dougherty, 7 Smith's Laws, 696.

⁵ Foster, 262; 1 Hawk. c. 31, s. 44; Crown cas. Res., Leach, 151 S. C.

sion, and she took up a small piece of iron used as a poker, intending to frighten him, and seeing she was very angry, he ran towards the door of the room, when she threw the poker at him, and it happened that the deceased was just coming in at the moment, and the iron struck him on the head, and caused his death; Park, J. A. J., said to the jury: "No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter, and there is no doubt if the child at whom the blow was aimed had been struck, and died, it would have been manslaughter, and so it is under the present circumstances."¹

Under this head may be classed those cases where medicine is administered, or an operation performed with intent to produce an abortion, and where the mother dies under the process. At common law, this has been held to be murder.² If there is mixed up in the offence an intent to do bodily harm to the mother, the same result follows.³ In a late case in Maine it has been said that as the general principle of law is that homicide with intent to commit a misdemeanor is but manslaughter, so in this case if the destruction of the *fetus* be but a misdemeanor, the offence is only manslaughter.⁴ This, however, is not the received doctrine,⁵ by which the offence is treated as murder, the destruction of an infant, *en ventre sa mere*, being even at common law in some respects felonious, and the act in its nature malicious and deliberate, and necessarily attended with great danger to the person on whom it is practised. Into what degree of murder such homicide falls, where there is a statutory division of homicide, will be hereafter considered in the appropriate chapter.

¹ R. v. Conner, 7 C. & P. 488.

² 1 Hale, 90, Com. v. Chauncey, 2 Ashmead, 227; Smith v. State, 3 Redding, 48.

³ Ibid.

⁴ Smith v. State, 3 Redding, 48.

⁵ Wh. C. L. 3 bb.; 1 Hale, 90; Com. v. Chauncey, 1 Ashmead, 227.

CHAPTER III.

HOMICIDE FROM GENERAL MALICE OR FROM COLLATERAL UNLAWFUL PURPOSE.

- I. General depraved inclination.
- II. Intent to commit collateral felony.
- III. Intent to commit collateral misdemeanor.
- IV. Intent to resist authority or to create public disturbance.

I.—GENERAL DEPRAVED INCLINATION.

When an action unlawful in itself is done with deliberation, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such an original intention doth not appear, which is matter of fact, and to be collected from circumstances given in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued, was unlawful.¹ Thus, if a person, breaking in an unruly horse, wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder. For how can it be supposed that a person wilfully doing an act, so manifestly attended with danger, especially if he showed any consciousness of such danger himself, should intend any other than mischief to those who might be encountered by him?² So if a man mischievously throw from a roof into a crowded street where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death on such as it might fall, and death ensue, the offence is murder at common law.³ And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of previous malice, though not directed against any particular individual; it is no excuse that the party was bent upon mischief generally.⁴

The lines of this species of homicide it is very important to preserve intact, for as has been lately pointedly observed, "Particular malice has the limited bounds of the person who is the object of it and who may be on his guard against it: but general malice has a wider scope, and falls on the unsuspecting. Is a man who fires a pistol at an indi-

¹ Wh. C. L. 367; 1 Rus. on C., 539; Foster, 261.

² 1 Hale, 476; 4 Black. Comm. 200; 1 East, P. C. 231.

³ Com. v. Dougherty, 7 Smith's Laws, 696. Post-appendix. Boles v. State, 9 S. & M. 284.

⁴ 1 Hale, 475; 3 Inst. 57; 1 East, P. C. 231.

vidual against whom he has ill-will, less criminal than one who fires a pistol at a crowd of an hundred people, against whom he has ill-will as a body, or as a part of the community? The absence of the personal animosity really aggravates the crime. In cases of particular malice, the sophistry of the passions often gives the act the character of a wild retribution, and the assassin persuades himself that he is getting rid of a monster who is a curse to society. This reasoning is perverse and dangerous; but is the state of the mind less detestable in which no wrongs, real, exaggerated, or imaginary, inflame the passions against the individual, but in which the knife is driven home to his heart, simply because he wears the form of a brother man? Which would argue the higher degree of depravity, the resolution, "I will kill A and B, who have insulted or injured me," or "I will kill the first man I meet be he who he may?"¹

II.—INTENT TO COMMIT COLLATERAL FELONY.

So far as this concerns the homicide of one person where the intent was to slay another, the subject has been already discussed; and so far, also, as concerns homicide committed in the perpetration of arson, rape, robbery, or burglary, it is treated under the head of murder in the second degree. Independently of these points, it may be regarded as a general rule, that if the act on which death ensue be *malum in se*, it will be murder or manslaughter, according to the circumstances; if done in prosecution of a felonious intent, but death ensued against or beside the intent of the party, it will be murder; but, on the other hand, if the intent went no further than to commit a bare trespass, it will be manslaughter. As, where A. shoots at the poultry of B., and, by accident, kills B. himself: if his intent were to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent; but if it were done wantonly and without that intent, it will be merely manslaughter. In another case, where A. strikes a horse on which B. is riding: whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A., but misadventure in B.²

III.—INTENT TO COMMIT COLLATERAL MISDEMEANOR.

The cases falling under this head are almost without an exception, those where homicides are committed in the prosecution of unlawful assemblies. These will be considered hereafter, under the chapter relating to riotous homicide: at present it is necessary to do no more than state that when a homicide occurs in the attempt to commit a misdemeanor, which is not of itself calculated to produce great bodily harm, the offence is but manslaughter.³

IV.—INTENT TO RESIST AUTHORITY OR TO CREATE PUBLIC DISTURBANCE.

This subject will be treated more fully in the next chapter, and in a subsequent chapter on riotous homicide.

¹ Mr. Fonblanque in the Examiner, Sat. May 11, 1850.

² Fost. 258-9; Plummer's case, 1 Hale, 475; 3 Inst. 56; Kel. 117; Sum. 56; 6 St. Tr. 222; 1 Hawk. c. 29, sect. 11, c. 31, s. 41; Smith v. State, 3 Redding, 49.

³ Ibid.

CHAPTER IV.

HOMICIDE BY OFFICERS OF JUSTICE AND PERSONS AIDING THEM.

- I. In obedience to a writ of execution.
- II. In effecting an arrest.
- III. In prevention of an escape.
- IV. In preservation of the peace.
- V. When acting improperly or with unnecessary severity.
- VI. When acting without authority.
- VII. When acting in self-defence.

I.—IN OBEDIENCE TO A WRIT OF EXECUTION.

Homicide committed by the Sheriff in execution of a warrant to that effect is of course justifiable, entitling him to an acquittal. It is important to observe, however, that the judgment and sentence must be strictly followed, since if death is inflicted otherwise than directed the officer will be guilty of felony at least, if not of murder.¹ If the judgment be to be hanged, and the officer behead the party, it is said to be murder;² and even the king was held not to be able to change the punishment of the law by altering the hanging or burning into beheading, though, when beheading is part of the sentence, the king may remit the rest.³ The better opinion seems to have been that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the common law;⁴ and that though the king cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it; and accordingly that an officer, acting upon a warrant from the crown for beheading a person under sentence of death for felony, would not be guilty of any offence;⁵ and it was in earlier days the practice, founded in humanity, when women were condemned to be burned for treason, to strangle them at the stake before the fire reached them, though the letter of the judgment was that they should be burnt in the fire *till they were dead*.⁶ The 30 Geo. 3, c. 48, now directs that they shall be fined as other offenders. The rule may still apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority. If an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter.

¹ 1 Hale, 501; 2 Hale, 411; 3 Inst. 52, 211; 4 Blac. 179.

² 1 Hale, 483, 454, 466, 501; 2 Hale, 411; 3 Inst. 52; 4 Blac. Com. 179.

³ 3 Inst. 52; 2 Hale, 412.

⁴ Fost. 270; F. N. B. 244, h; 19 Rym. Fœd. 284.

⁵ Fost. 268; 4 Blac. Com. 405; 1 East, P. C. c. 5, s. 96; p. 335.

⁶ Fost. 268.

⁷ 1 Hawk. P. C. c. 29, s. 5.

II.—IN EFFECTING AN ARREST.

As a general principle, officers of the law when their authority to arrest or imprison is resisted, will be justified in opposing force to force if death should be the consequence;¹ yet they ought not to come to extremities upon every slight interruption, without a reasonable necessity.² If they should kill where no resistance is made, it will be murder; and the same rule will exist if they should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled.³

The cases under this head may be classed as follows:—

1.—Civil.

2.—Criminal.

I. CIVIL.

In civil suits, if the party against whom the process has issued, fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer not being able to overtake him, make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it has been said that it will amount to murder.⁴ But this is an extreme case, for the same authorities inform us that if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence,⁵ and if there be resistance, and an affray ensue, during which the party sought to be arrested is slain, the offence will be but manslaughter. Thus in a leading case, which has been the cause of much discussion, but which when all the facts are considered is in conformity with the general line of authority, Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, "He did not intend to hurt the officers, but he would not be ill-used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and, words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: *one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manslaughter, *by reason of the first assault with the cane*: but Mr. Justice Foster thinks it a very extraordinary case, as thus reported; and mentions

¹ 4 Blac. Com. 180.

² 1 East. P. C. 297.

³ 1 Hale, 481; Fost. 291.

⁴ 1 Hale, 481; Fost. 291.

⁵ R. v. Tranter, Stra. 499.

the following additional circumstances, which are stated in another report. 1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought them down, because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot, (for both pistols were discharged in the affray,) and slightly wounded on the wrist by some sharp pointed weapon, and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Mr. Lutterel's begging for mercy was not, that he was on the ground begging for mercy, but that on the ground he held up his hands, *as if* he was begging for mercy. Upon these facts the chief justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared it would be no more than manslaughter.¹

2.—CRIMINAL.

A distinction here exists between cases of misdemeanor and felony. In the former, (with the exception, however, of some cases of flagrant misdemeanors,) it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; and, generally speaking, it will be murder: but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended.²

On this principle it has been ruled that it is no excuse for killing a man that he was out at night as a ghost, dressed in white for the purpose of alarming the neighbourhood, even though he could not otherwise be taken. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and upon meeting with a person dressed in white, immediately shot him. McDonald, C. B., Rooke and Lawrence, Js., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter: but the court said that they could not receive that verdict; and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced: but the prisoner was afterwards reprieved.³

Where, however, resistance is made, yet if the officer kill the party after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter.⁴

¹ Fost. 293-4.³ R. v. Smith, 4 Blac. Com. 201, (Note.)² 1 East, P. C. 302.⁴ 1 East, P. C. 525.

A well-grounded belief that a felony is about to be perpetrated will extenuate a homicide committed in prevention of it, though the defendant be but a private citizen, but not a homicide committed in pursuit, unless special authority be given.¹

Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. And the same rule holds if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills him; and the jury ought to inquire, whether it were done of necessity or not.² The slayer, in such cases, must not only show that a felony was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest.³

So long as a party, liable to arrest, endeavours peaceably to avoid it, he may not be killed; but whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him, he may be killed, and the act will be excusable.⁴

III.—IN PREVENTION OF AN ESCAPE.

When a felony has been committed, and the offender is in duress, the officer is bound to make every exertion to prevent an escape; and if in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable. This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it: for if, in these cases, fresh pursuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. The same rule holds, if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake without killing him. But if he may be taken, in any case, without such severity, it is at least manslaughter in him who kills him: and the jury ought to inquire whether it were done of necessity or not.⁵

Jailers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore, an assault upon a jailer, which would warrant him (apart from personal danger,) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent.⁶

Jailers and their officers are under the same special protection as other ministers of justice: but in regard to the great power which they have, and, while it is exercised in moderation, ought to have, over their prisoners, the law watches their conduct with a jealous eye. If a prisoner under a jailer's care die, whether by disease or

¹ *State v. Rutherford*, 1 Hawkes, 457; *Selfridge's Trial*, 160; *R. v. Haworth*, 1 Mood. C. C. 207; *R. v. Williams*, *Ibid.* 387; *R. v. Longden*, R. & R. 228.

² 1 Hale, 481; *Fost.* 27; 1 *Rus. on Cr.*, 533.

³ *State v. Roane*, 2 Dev. 58.

⁴ *State v. Anderson*, 1 Hill's S. C. R., 327.

⁵ 1 Hale, 481, 489; 2 Hale, 75-6, 91, 101-2; *Fost.* 271, 309; *Stat. 9 Ann.*, c. 16;

1 *Hawk. c.* 28, sect. 11; 2 *Hawk. c.* 12, sect. 1; 4 *Blac. Com.* 180; 3 *Inst.* 118, 220-1.

⁶ 1 *Rus. on Cr.*, 644.

accident, the coroner, upon notice of such death, which notice the jailer is obliged to give in due time, ought to resort to the jail; and there, upon view of the body, make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the jailer or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress.¹ The person *guilty* of such duress will be the party liable to prosecution, because, though in a civil suit, the principal may in some cases be answerable in damages to the party injured through the default of the deputy; yet, in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults.² And so where a jailer, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the distemper, of which fact the jailer had notice, caught the distemper, and died of it: this was holden to be murder.³

As has already been noticed, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken;⁴ yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him, it will in general be murder.

IV.—IN PRESERVATION OF THE PEACE.

This subject will be more fully considered in the chapter on Riotous Homicide. At present it is sufficient to observe that, if officers of the law, when engaged in the preservation of the peace, find it necessary to take life, such homicide is justifiable. The rule is not confined to the instant the officer is on the spot, and at the scene of action engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same: and, therefore, if he cometh to do his office, and meeting great opposition retireth, and in the retreat is killed, this will amount to murder. He went in obedience to the law, and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And upon the same principle, if he meeteth with opposition by the way, and is killed before he cometh to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence, this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. It follows, from these premises, that if such an officer successfully resists those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty, he is justified, even should the lives of the assailants, their aiders and abettors, be taken, from the necessary extent of the resistance so made.⁵

A homicide committed within the territory of the United States,

¹ Fost. 321.

² R. v. Huggins, 2 Str. 882; R. v. Allen, 7 C. & P. 153; R. v. Green, 7 C. & P. 156.

³ Fost. 322. ⁴ 1 Hale, 481; Fost. 271, ante p. 49. ⁵ King, P. J., 4 Penn. Law Jour., 29.

by a subject of Great Britain, in time of peace, though avowed to be under the directions of the local authorities of Great Britain, may be prosecuted in our courts as murder.¹

V.—WHEN ACTING IMPROPERLY, OR WITH UNNECESSARY SEVERITY.

An arrest, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder. And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter. In all cases, the officer should proceed with due caution; and, although it is not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity, in order to execute his duty. And, therefore, where a collector, having distrained for a duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to the officer to be a sufficient provocation to extenuate the homicide; yet they were clearly of opinion that he was guilty of manslaughter, in so far exceeding the necessity of the case. And where no resistance at all is made, and yet the officer kills, it will be murder. So, if the officer kill the party after the resistance is over, and the necessity has ceased, it is manslaughter at least; and, if the blood had time to cool, it would, as is stated by Mr. East, be murder.²

VI.—WHEN ACTING WITHOUT AUTHORITY.

An officer who makes an arrest out of his proper district, or without any warrant or authority, and purposely kills the party for not submitting to such illegal arrest, will, generally speaking, be guilty of murder in all cases where an indifferent person, acting in the like manner, without any such pretence, would be guilty to that extent.³

As has already been observed in the case of private persons using their endeavours to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; as, if the suspicion be not supported by the fact, the person endeavouring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter.⁴

Within this general principle of amenability, fall those cases where there is a killing by military or naval officers without authority. Thus, if a court martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder.⁵

And so, where the captain of a man of war had a warrant for impressing mariners, upon which a deputation was endorsed in the usual form to the lieutenant; and the mate, with the prisoner Dixon, and

¹ *People v. M'Leod*, 1 Hill, 397.

² 1 East, P. C. 297; 1 Hale, 481, 489, 494; 2 Hale, 84; *Caffe's Case*, 1 Ver tr. 216.

³ 1 East, P. C. 312. ⁴ Fost. 318.

⁵ *Warder v. Bailey*, 4 Taunt. 77.

some others, but without either the captain or lieutenant, impressed one Anthony How, who never was a mariner, but was servant to a tobacconist, and upon How making some resistance, and for that purpose drawing a knife, which he held in his hand, Dixon, with a large walking-stick, about four feet long, and a great knob at the end of it, gave How a violent blow on the side of his head, of which he died in about fourteen days; it was adjudged murder. The capture and detention of How were considered as unlawful on two accounts; first, because neither the captain nor lieutenant were present, and Dixon was no lawful officer for the purpose of pressing, nor an assistant to a lawful officer; secondly, because How was not a proper object to be impressed. It was lawful, therefore, under these circumstances, for How to defend himself; and Dixon's killing him, in consequence of an unlawful capture and detention, was murder.¹

VII.—WHEN ACTING IN SELF-DEFENCE.

Although an officer must not kill for an escape, where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party. Upon a trial for murder it appeared that the prisoner, an excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers, in the act of landing whisky from the Scottish shore, contrary to law: the deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded; the officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault; that, seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not; but the deceased disregarded the warning, and rushed towards him to make a fresh attack; that he thereupon fired a second pistol, and killed him. Holroyd, J., told the jury, "an officer must not kill for an escape, where the party is in custody for a misdemeanor, but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement, in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is, whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to."²

¹ 1 East, P. C. 313.

² Forster's case, 1 Lewin, 187. 1 Bus. on Cr. 643.

CHAPTER V.

HOMICIDE OF OFFICERS OF JUSTICE AND OTHERS AIDING THEM.

WHEN a party who having authority to arrest or imprison, uses the proper means on a proper occasion for such a purpose, and in so doing is arrested and killed, it will be murder in all concerned. Thus, where an affray had taken place, and a quarterly serjeant appeared and ordered the wranglers to desist, and on their not doing so, reported to the orderly serjeant, who called at the room, and ordered the persons engaged to the guard house, but the prisoner remained behind on some pretence connected with his clothes, and when the serjeant was temporarily absent declared he would be the death of any one who attempted to take him to the guard house, retired to a corner of the room where a number of unloaded muskets had been left, loaded one, and when the serjeant entered, with another, accosted him, "Stand off; if you approach, I will take your life." He immediately afterwards fired, and mortally wounded the serjeant and his companion. The case depended on the question whether or not at the time the defendant was legally liable to arrest, and the court, Story, J., and Davis, J., charged the jury that if such was the case, the offence was manslaughter; if otherwise, murder.¹

Sir William Russell thus states the law:—Upon these principles it may be laid down as a general rule, that *where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take a part in such resistance*; for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that *resistance* be made; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other hand, the persons resisting will be guilty of murder.² And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person be slain in endeavouring to keep the peace and suppress the affray, he who kills him will be guilty of murder.³ But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the king's name to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it;⁴ unless, indeed, he were an officer within

¹ U. S. v. Travers, 2 Wheeler's C. C. 495. See Com. v. Drew, 4 Mass. 391.

² Fost. 270, 271; 1 Hale, 494; 3 Inst. 56; 2 Hale, 117, 118.

³ 1 Hawk. P. C., c. 31, s. 48, 54.

⁴ Fost. 272.

his proper district, and known, or generally acknowledged, to bear the office he had assumed.¹ As if A., B., and C., be in a tumult together, and D., the constable, come to appease the affray, and A., knowing him to be the constable, kill him, and B. and C. not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C.² Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder; and such as did not know it, of manslaughter only.³

If, however, the arrest be made unlawfully, the killing, if it turns out no felony has been committed, is not murder.⁴ If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him: if the party attempting the arrest were a constable, the killing is murder;⁵ if a private person, manslaughter;⁶ because the constable has authority, by law, to arrest in such case, but a private person has not. The same rule is good in all the cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony.⁷

The subject matter of this chapter will be considered under the following heads:—

I. Who have authority to arrest.

1st. Officers of justice.

- (1.) Constables and policemen.
- (2.) Bailiffs and tipstaves, in civil matters.
- (3.) Officer acting out of jurisdiction, or without warrant.
- (4.) Notice, what constitutes, and effect of want of it.
- (5.) By whom a warrant may be executed.
- (6.) How long a warrant continues in force.
- (7.) When process is illegal.
- (8.) When arrest is made without any warrant.

2d. Ship's officers.

3d. Private persons.

II. In what cases.

1st. Felonies.

2nd. Misdemeanors.

3d. Affrays.

4th. Street-walkers, vagrants, &c.

III. When the arrest may be made.

IV. Officers taking opposite parts.

V. How arrest may be made, and herein of breaking open doors.

VI. How far third parties may resist.

¹ 1 Hawk. P. C., c. 31, s. 49, 50.

² 1 Hale, 438.

³ 1 Hale, 446; 1 Rus. on Cr. 535.

⁴ Com. v. Drew, 4 Mass. 391: U. S. v. Travers, 5 Wheeler's C. C. 495: R. v. Phelps, 1 C. & M. 138.

⁵ 1 Hawk. c. 28, sect. 12; 2 Hale, 84, 87, 91.

⁶ See 2 Hale, 83, 92.

⁷ See Samuel v. Payne, Doug., 359.

I. WHO HAVE AUTHORITY TO ARREST.

1st. *Officers of Justice.*

(1.) Constables and Policemen.

The general rule in this respect is thus stated by Sir W. Russell:—Ministers of justice, as bailiffs, constables, watchmen, &c., while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political equity; for, without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. If, therefore, upon an affray, the constable, and others in his assistance, come to suppress the affray and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and, therefore, the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm: so if the sheriff, or any of his bailiffs, or other officers, is killed in executing the process of the law, or in doing their duty, it is murder; the same is the law as to a watchman who is killed in the execution of his office.¹ This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo*: and therefore if he come to do his office, and meeting with great opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty (which is a fact to be collected from circumstances appearing in evidence,) this likewise will amount to murder.²

A constable who had verbal orders from the magistrates to apprehend all thimble-riggers, attempted to apprehend the defendant and his companions, who were playing at thimble-rig in a public fair, and succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public house, endeavoured to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable calling others to his assistance, broke open the privy and attempted to apprehend the prisoner, who stabbed one of the party; it was holden that the constable had an authority to apprehend the defendant.³

¹ 1 Rus. on Cr. 533. 1 Hale, 456, 460.

² Fost., 308—9. See also Com. v. Drew, 4 Mass., 791; U. S. v. Travers, 2 Wheeler's C. C. 509.

³ R. v. Gardner, 1 Mood., C. C. 390.

In another case, where the defendant took his tools and left his work, saying that he would do for any bloody constable that offered to stop him, and his master applied to a constable to take the defendant, but made no charge against the defendant, and the master and the constable followed the defendant, and found him in a public privy, as if he had occasion there, and the master said, "This is the man, I give you charge of him;" upon which the constable said, "Your master gives you in charge of me, you must go with me;" and the defendant immediately stabbed the constable; it was holden, by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest, when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to make the arrest, was such a provocation as reduced the offence to manslaughter only.¹

A policeman, or other officer appointed by the municipal authority for the preservation of order and the prevention of crime, is entitled to the same protection which we have just stated to belong to a constable. Thus, where a policeman saw the prisoner playing the bagpipes in a street at half-past eleven o'clock at night, by which he collected a large crowd round him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor; it was held, that if the prisoner was collecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand upon his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing.²

And as where a policeman between eleven and twelve o'clock at night was called upon to clear a beer-house, which he did, and then went into the street where the prisoner and many others were standing near the door, when the prisoner refused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat; it was held that if the policeman had died, this would have been murder, for if a policeman had heard any noise in the beer-house at such a time of night, he would have acted within the line of his duty, if he had gone in, and insisted that the house should be cleared; and much more so, if he was required by the landlady; and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn to the clearing of the house, and if any thing was saying or doing likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so; and if, in so doing, he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening lan-

¹ *R. v. Thompson*, 1 Mood. C. C. 78.

² *R. v. Hagan*, 8 C. & P. 167. Bolland, B., and Coltman, J.

guage, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and used threatening language if any one ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place, in order to get him to go home; and, therefore, any thing that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and, therefore, any blow that was given afterwards with a cutting instrument would be precisely the same as if it had been given without any thing being done by the policeman.¹

(2.) Bailiffs or tipstaves in civil cases.

As a general rule, in this class of cases, though an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity: yet, if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means.²

In the case of a *private or special bailiff*, either it must appear that the party knew that he was such officer, as where the party said, "Stand off, I know you well enough; come at your peril;" or, that there was some such notification thereof that the party might have known it, as by saying, "I arrest you." These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder. A private bailiff ought also to show the warrant upon which he acts, if it is demanded: and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to show at whose suit, and for what cause the arrest is made, out of what court the process issues, and when and where returnable.³ In no case, however, is he required to part with the warrant out of his own possession: for that is his justification.⁴

It is clear, also, that the authority of an officer, in civil cases, must be regulated and limited by the writ or process which he is empowered to execute, and by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest or imprison, as no private person can of his own authority arrest in civil suits.⁵ As will presently be seen more fully, where he proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess: and if he be killed, the offence will amount to no more than manslaughter in the person whose liberty is so invaded.⁶ He should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it will be

¹ R. v. Hems, 7 C. & P. 312. Williams, J.

² 1 Hale, 481; Fost. 279.

⁴ 1 East, P. C., c. 5, s. 83, p. 319.

³ 1 Hale, 458, note (g), 6 Co. 54 a, 9 Co. 69 a.

⁵ 1 Hawks, N. C., c. 28, s. 19. ⁶ Fost. 312.

only manslaughter.¹ But, if the process be executed within the jurisdiction of the court or magistrate from whence it issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office.²

(3.) Officer acting out of jurisdiction, or without warrant.

As is stated by Sir William Russell,³ the party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant: and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law: and therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter.⁴ And it has been ruled that homicide committed upon a bailiff, attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause will not amount to murder.⁵ It has been held, that if the constable of the vill of A come into the vill of B to suppress some disorder, and in the tumult the constable be killed in the vill of B, this will be only manslaughter, because he had no authority in B as constable.⁶ But it was considered, that if the constable of the vill of A had a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A, to suppress a riot in the vill of B, or to apprehend a person in the vill of B for some misdemeanor within the jurisdiction and cognisance of the justice of the peace, and in pursuance of that warrant he went to arrest the party in B, and in executing his warrant was killed in B, this amounted to murder. Under the former English practice, where a warrant was directed "to C. S., one of the collectors of the parish of W., the constables of the said parish, and all others his majesty's officers," to levy a distress, it was held that the constable of W. had no authority to execute it out of the parish of W.: the rule of law being, that where a warrant is directed to officers, as individuals, or to individuals who are not officers, they may execute it any where within the extent of the magistrate's jurisdiction; but where it is directed to men by the name of their office, it is confined to the districts, in which they are officers. But the law in England as to the latter point was altered by the 5 Geo. 4, c. 18, which recites, that warrants addressed to constables, headboroughs, tithing-men, borsholders, or other peace officers of parishes, townships, hamlets, or places, in their characters of and as constables, headboroughs, tithing-men, borsholders, or other peace officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice; and then for remedy thereof enacts, "that it shall and may be lawful to and for each and every constable, and to and for each and every headborough,

¹ 1 Hale, 458; 1 East, P. C. 314. See next section.

² 1 Hale, 459.

³ 1 Russ. on Cr. 532—592. 1 Hale, 457—9; 1 East, P. C., c. 5, s. 80, p. 312, 314.

⁴ 1 Russ. on Cr. 615.

⁵ R. v. Mead et al., 2 Stark., c. 205.

⁶ 1 Hale, 459.

tithing-man, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, township, hamlet or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted when granting such warrant or warrants, or when backing or endorsing any such warrant or warrants, in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithing-man, borsholder, or other peace officer, specially, by his name or names, and notwithstanding the parish, township, hamlet, or place, in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place, for which he shall be constable, headborough, tithing-man, or borsholder, or other peace-officer; provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or endorsed." This statute has been ruled not to extend to the warrant of a judge of the King's Bench, but only to the warrants of persons having authority as justices of the peace within the limited jurisdictions therein expressed.¹ It may be observed, that if a warrant be directed to several persons, any of them may execute it.²

(4.) Notice, what constitutes, and effect of want of it.

Where a party is apprehended in the commission of an offence, or upon fresh pursuit afterwards, notice is not necessary, because he must know the reason why he is apprehended. Thus, upon an indictment for maliciously wounding, it appeared that the assistant to the head keeper of Sir R. S. went with five or six assistants towards a covert of Sir R. S., where they heard guns; they then went towards the place, and rushed in at the poachers to take them; the prosecutor saw six persons in the wood, and he ran after them; they got into a field about six yards off; they then ranged themselves in a row, the prosecutor being five or six yards from them, on the edge of the plantation, and he heard one of them say, "The first man that comes out I'll be d—d if I don't shoot him," upon which the prosecutor drew his pistol, cocked it, and ran out: they all ran away together; the prosecutor followed them, and when they had run about fifty yards they stood; they had all turned round; one of them shot at the prosecutor who was running to him; the prosecutor was wounded; the men said nothing to the prosecutor before he was shot, nor he to them; it was objected, that, inasmuch as the prosecutor's authority to apprehend them was derived from the act creating the offence, it was incumbent upon him to give notice to them: the objection was overruled: and, upon a case reserved, the judges were of opinion that the circumstances constituted sufficient notice.³ So where a servant of Sir T. W. was out with his gamekeeper at night, and they heard

¹ See 1 Rus. 615. *Gladwell v. Blake*, 5 Tyrw. 186.

² 1 Hale, 452.

³ *R. v. Payne*, R. & M. C. C. R. 378. See *R. v. Fraser*, R. & M. C. C. R. 419.

two guns fired, and went towards the place, and got into a covert, and saw some men there who ran away, and the servant pursued them, and got close up to one of them, and made a catch at his legs, and was immediately shot through the side; Parke, B., said, "Where parties find poachers in a wood, they need not give any intimation by words that they are gamekeepers, or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose when he sees another at his heels?"¹

So in another indictment for the same offence, it appeared that two persons heard a noise in a board-house, near midnight, and saw the prisoner inside the board-house, and heard a noise among the boards, and heard the prisoner say, "Bring that board:" on which the persons went for the owner, who came in a quarter of an hour, when no one was found in the board-house; but two planks had been removed to a part of the board-house nearer the door, and after searching in several places they found the prisoner in the garden of another person, crouched down under a tree, with a drawn sword in his hand, and being asked twice what he did there, he made no answer, and then started off, but was pursued and caught hold of by one of the persons, whom he compelled to leave his hold; he then fell over something, and the others came up, and he then attempted to get away, but was prevented by some paling, and he then turned round and wounded the owner of the boards; it was held, on a case reserved, that the circumstances of the case told him why he was apprehended, and that it was not to tell him what he must have known.²

If a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, in the day time when it can be seen, it is conceived that this will be a sufficient notification of the intent with which he interposes; and that, if resistance be made after this notification, and he or any of his assistants killed, it will be murder in every one who joined in such resistance.³ For it seems, that in the case of a public bailiff, a bailiff *juratus et cognitus*, acting in his own district, his authority is considered as a matter of notoriety; and upon this ground, though the warrant by which he was constituted bailiff be demanded, he need not show it; and it is sufficient, if he notify that he is the constable, and arrest in the king's name.⁴ And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted, and killed in the attempt.⁵ Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed to the constable of *Pattishal*, and delivered by the person who had obtained it to the deceased, to execute, as constable of the parish, and it appeared that the deceased went to the prisoner's house in the day time to execute the warrant, had his constable's staff with him, and gave notice of his business, and further that he had before acted as constable of the parish, and was gene-

¹ R. v. Davis, 7 C. & P. 785, Parke, B. See R. v. Taylor, 7 C. & P. 266, Vaughan, J.

² R. v. Howarth, R. & M. C. C. R. 207. 1 Rus. on Cr. 603. See R. v. Woolmer, R. & M. C. C. R. 334. 1 Rus. on Cr. 598.

³ Fost. 311.

⁴ 1 Hale, 583.

⁵ 1 Hale, P. C., c. 5, s. 81, p. 315.

rally known as such: it was determined that this was sufficient evidence and notification of the deceased being constable, although there were no proof of his appointment, or of his being sworn into the office.¹ So in the Sissinghurst house case,² it was resolved that there was sufficient notice that it was the constable before the man was killed: 1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, *viz.*, that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, he commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

If a constable command the peace,³ or show his staff of office,⁴ this, it seems, is a sufficient intimation of his authority. In such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient.⁵ Where he shows his warrant,⁶ or where it appears that he is known to the defendant as an officer; as, for instance, when the defendant said, "Stand off, I know you well enough, come at your peril,"⁷ if, after this, the officer be killed, it will be murder. If the constable interfere to prevent an affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several know him to be a constable, it will be murder in him, manslaughter in the rest.⁸ Where a bailiff rushed into a gentleman's bed-chamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, in the impulse of the moment, wounded him with his sword, and killed him: this was holden to be manslaughter.⁹

(5.) By whom a warrant may be executed.

The English rule is that the warrant must be executed by the party named in it, or by some one assisting such party, either actually or constructively. Thus under an indictment for maliciously cutting, it appeared that a warrant issued by commissioners of bankrupt was directed to "J. Adams and W. Smith, our messengers and their assistants;" and that the prosecutor, who was the assistant of Smith, having obtained the warrant from him, went in pursuit of the prisoner, who, on the prosecutor overtaking him, and saying he had the warrant, wounded the prosecutor with a stone; neither Smith nor Adams being present at the time, nor anywhere near the place where the attempt to arrest occurred: it was objected that the prosecutor was not authorized by the warrant to arrest the prisoner except in the presence, actual or constructive, of either Adams or Smith, and that the word "assistants" only extended to persons who went with Adams and Smith to assist in taking the prisoner. Williams, J., said "I think it is not sufficient that the prosecutor should have been deputed to act on the warrant by the messenger; and I think, also, that to authorize him to act, he must derive his authority direct from

¹ 1 East, P. C., c. 5, s. 81, p. 315.

² 1 Hale, 461.

³ 1 East, P. C. 315; Wh. C. L., 2d ed., 269.

⁴ R. v. Pew, Cro. Car. 183.

⁵ 1 Hale, 438.

⁶ 1 Hale, 492, 493.

⁷ Fost. 311.

⁸ 1 Hale, 461.

⁹ 1 Hale, 470.

the commissioners themselves. It appears to me that the term "assistant" would apply to any person whom Adams or Smith directed to go in aid of them. It therefore remained uncertain who those assistants might be, till either Smith or Adams had named them; and I think that is not a legal execution of the warrant, unless it be executed in the presence, actual or constructive, of either Adams or Smith, who are named in it."¹ And so under another indictment for the same offence it appeared that a constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit of the prisoner, in company with his brother, the father stayed behind; the brothers found the prisoner lying under a hedge; and when they came up he had a knife in his hand, running it into the ground; he got up from the ground to run away, one of them laid hold of him, and he stabbed him with the knife; the father was in sight at about a quarter of a mile off. Parke, B., said, "The arrest was illegal, as the father was too far off to be assisting in it."² So where upon a similar indictment.

(6.) How long a warrant continues in force.

Lord Kenyon has gone so far as to say that, as no time is fixed for the execution of a warrant, it continues in force till fully executed, though it be for seven years after its date, provided the magistrate continues alive.³

The prisoner was indicted for maliciously wounding the prosecutor with intent to resist his apprehension for a certain offence, to wit, for that he on, &c., at, &c., did violently assault and beat one W. P. The prosecutor having received a warrant, whereby he was commanded "to apprehend the prisoner and to bring him before me to answer unto the said complaint, (assaulting W. P.) and to be further dealt with according to law," went in search of the prisoner, and brought him before the magistrate, who granted the warrant, and another magistrate; he was ordered to find bail; he said he would not; upon which he was ordered to be committed; whilst the commitment was making out he made his escape; the prosecutor was ordered to go after him; there was no authority in writing; but in consequence of the verbal directions of the magistrates to the clerk, who was making out the commitment, the latter ordered the prosecutor to go after the prisoner: the prosecutor accordingly did so, and in attempting to apprehend the prisoner was cut by him with a knife; it was objected on the part of the prisoner that the count was not proved, for that the party having been taken before the magistrate, the warrant was *functus officio*; and that the second taking was for having made his escape from the office; secondly, that the count was bad, as it did not follow that the offence stated, viz., assaulting W. P., was an offence for which the prisoner was liable to be apprehended; but Gaselee, J., thought the warrant continued in force, and that the second objection was upon the face of the record; and the jury having

¹ R. v. Whalley, 7 C. & P. 245.

² Rex v. Patience, 7 C. & P. 775.

³ Dickenson v. Brown, Peake, N. P. 344.

found the prisoner guilty, both objections were considered upon a case reserved, and the conviction was held good.¹

(7.) When process is illegal.

The English decisions, we are told by Mr. Roscoe,² "would appear to countenance the position that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter." In Thompson's case,³ where the officer was about to make an arrest on an insufficient charge, the judge adverted to the fact, that the prisoner was in such a situation that he could not get away. In these cases it would seem to be the duty of the party, whose liberty is endangered, to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So, also, where, as in Stockley's case,⁴ and in Curtis' case,⁵ the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such cases from the operation of the general rule, that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "it may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrongdoer."⁶ It may be remarked that this question is fully decided in the Scotch law, the rule being as follows:—In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained.⁷ "If," says Baron Hume, "instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder."⁸ "The distinction appears to be," says Mr. Alison, "that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error was not known to the

¹ *Rex v. Williams*, R. & M. C. C. R. 387. This case goes on the ground that as no time is prescribed for the execution of a warrant, it continues in force till fully executed, though it be seven years after its date, provided the magistrate so long lives. *Dickenson v. Brown, Peake*, N. P. 344, Lord Kenyon, C. J.

² *Crim. Ev.* 707-8.

³ 1 R. & M. C. C. R. 80.

⁴ 1 East, P. C., c. 5, s. 78, p. 310.

⁵ *Fost.* 135.

⁶ 1 East, P. C. 328.

⁷ Alison's *Princ. Cr. Law of Scotl.* 25.

⁸ 1 Hume, 250.

party resisting; whereas, the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only."¹ In such cases, as is well stated, it may be deserving of consideration, whether the first inquiry ought not to be, whether or not the act done was caused by the illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest, as if it arose from previous ill will, it should seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have afforded any provocation for it. Such a case would be like the cases where blows have been given by the deceased, but the fatal blow has been inflicted in consequence of previous ill will.² From the observations of Mr. B. Parke, in *Rex v. Patience*,³ it appears that the very learned baron was of opinion that if there were previous malice, the illegal arrest would not reduce the crime to manslaughter; because the previous malice was the cause of the act, and not the illegality of the arrest. In such an inquiry, the fact that the prisoner was ignorant at the time that the arrest was illegal would be most material, because it would almost conclusively show that the act did not arise from that cause. It should also be observed, that if "one has a legal and illegal warrant and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has is his justification;"⁴ so it might be contended that if the party apprehended had committed a felony, as he might be apprehended by any individual without a warrant, the apprehension by a constable under a defective warrant would not be illegal, as he might justify the arrest as a private individual.⁵ So also as a constable has authority to apprehend any person within his district, whom he has reasonable ground to suspect of having committed a felony;⁶ in such a case, also, it might be contended that he might justify the arrest, although in fact he did apprehend under an illegal warrant.

If a constable, having a warrant directing him to apprehend A. B., arrest C. B. under the warrant, such arrest is illegal, although C. B. were the person against whom the magistrate intended to issue the warrant, and although the person who made the charge before the magistrate, pointed out C. B. as the man against whom the warrant was issued. A magistrate for the county of Herts issued his warrant, directing a constable to take John H., charged with stealing a mare. Armed with this warrant, the constable went to Smithfield, and there arrested Richard H., who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant, and who was supposed to be called John H.; his name, however, was really Richard H., John H. being the name of his fa-

¹ See *R. v. Thomas*, 7 C. & P. 817.

² 7 C. & P. 775, ante, p. 63.

³ *Alison's Princ. Cr. Law of Scotland*, 28.

⁴ Per Holt, C. J. *Greenville v. The College of Physicians*, 12 Mod. 386; and see *Crawford v. Ramsbottom*, 7 T. R. 654; *The Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264.

⁵ Per Tindal, C. J., in *Hoye v. Bush*, 1 M. & Gr. 775.

⁶ *Beckwith v. Philby*, 6 B. & C. 638, post, p. 74.

her. There was no proof that a felony had been committed. The person who made the charge before the magistrate pointed out Richard H. as the man who had stolen the mare, and a person present said that his name was John H., and there was clearly evidence to go to the jury that Richard H. was the man intended to be taken. p. Coltman, J., told the jury that the law would not justify the constable's act, the warrant being against John and not against Richard, although Richard was the party intended to be taken; that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name; that a constable may, in many cases, take up a person on a charge of felony, by virtue of his office of constable, and without any warrant from a magistrate; but that he can only do so within the district for which he is chosen constable. The jury having found a verdict against the constable, the court held that the direction was right, declaring that in civil process, the taking of a person by the name mentioned in a warrant, his real name being different, cannot be justified, and that no distinction could be made between civil and criminal process, as in either case the object of the warrant is to identify the party intended to be arrested.¹

So far indeed has the doctrine of the necessity of legal completeness and precision in the warrant been carried, that a warrant, leaving a blank for the Christian name of the person to be apprehended, and giving no reason for the omission, but describing him only as — H., the son of S. H., and stating the charge to be for assaulting J. B. in the execution of his duty, without particularizing the time, place, or any other circumstances of the assault, has been held too general and unspecific, and it was, therefore, ruled that a resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder. Thus, upon an indictment for maliciously wounding, it appeared that George Hood having assaulted Brown, a sheriff's officer, who was endeavouring to arrest his father, Samuel Hood, under a *capias ad respondendum*, Brown applied to a magistrate for a warrant to apprehend George Hood for an assault, but not being at that time acquainted with his Christian name, the warrant, so far as it related to the name and description of the person committing the assault, was in the following terms, viz., "to take the body of — Hood (leaving a blank for the Christian name) of, &c., by whatsoever name he may be called or known, the son of Samuel Hood, to answer, &c., on the oath of Francis Brown, an officer of the sheriff of the county of Wilts, for assaulting him in the execution of his duty." This warrant was delivered to the tithing-man to execute, and he went to S. Hood's house, with Brown and others to execute it; and Brown pointed out G. Hood to the tithing-man as the person on whom the warrant was to be executed, and upon attempting to apprehend him, he stabbed a person whom the tithing-man had charged to aid and assist. S. Hood had four sons who resided with him. It was objected that as the Christian name of George Hood was omitted, the warrant was illegal, and would not authorize its apprehension; and, upon a case reserved, the judges were unani-

¹ *Hoye v. Bush*, 1 M. & Gr. 775.

mously of opinion that the warrant was bad, because it omitted the Christian name; it should have assigned some reason for the omission, and have given some particulars of George Hood, by which he might be distinguished from his brothers.¹

It should be observed, however, that in this case, in addition to the omission of the Christian name, the warrant was defective in not showing that the offence was committed within the jurisdiction of the magistrate by whom it was granted.

As has already been noticed, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice:² and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it.³

If a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong-doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter and not murder.⁴

The question of the illegality of blank warrants—a species of process formerly common in England, and at present to be frequently met with in this country—has been settled in England by a series of decisions which admit of no dispute. Thus, as early as 1753, the prisoner Stockley, about Lady-day, 1753, had been arrested by Welch, the deceased, at the suit of one Bourn, but was rescued; and he afterwards declared, that if Welch offered to arrest him again, he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle, (who acted for the under-sheriff of Staffordshire,) to have warrants made out upon such writ. The custom of the under-sheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper, and delivered it to Welch, who inserted therein the names of Thomas Clewes and William Davil, on the 12th of July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into Stockley's house first, and called for refreshment; but, an alarm being given that Welch was coming, the door was locked: upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this, Welch and Howard endeavoured to get into the house: and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley then absconded, and was not apprehended till December, 1771. At the Lent Assizes following, he was tried for murder, when the jury expressly found that the deceased attempted to get into the house to

¹ R. v. Wood, 1 R. & M. C. C. R. 281.

² 1 East, P. C., c. 5, s. 8, p. 310.

³ Curt's Case, Fost. 135; and see Fost. 312.

⁴ Tuckett v. The State, 3 Yerger, 392.

assist in the arrest of Stockley. Howard, Clewes, and Davil, being dead, their depositions before the coroner were read, and minutes were taken of the above facts for a special verdict: but, to save expense, the case was referred to the judges of the King's Bench, who certified that the offence amounted, in point of law, only to manslaughter.¹ The same point has been frequently ruled since,² and it has ever been held that the arrest was illegal, where the warrant was filled up after it had been sealed.³ But if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems that the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. Banks and Powell had a warrant from the Sheriff of Salop, upon a writ of possession against the prisoner's house; and their names were interlined after the warrant was sealed, but before it was sent out of the office. The prisoner refused them admittance; and, on their bursting open the door, shot at Banks, and wounded him severely. Upon an indictment for wilfully shooting, upon the 43 Geo. 3, c. 58, objection was taken that the warrant gave Banks and Powell no authority, because their names were inserted after it was sealed. But the prisoner having been convicted, and the point reserved for the consideration of the judges, all who were present (*viz.* 11) held that the conviction was right.⁴ But where a magistrate who kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavouring to arrest the party, was killed; it was held that this was murder in the person killing the officer, and he was accordingly executed.⁵

When a bailiff having a warrant to arrest a person upon a *capias ad satisfaciendum*, came to his house, and gave him notice; upon which the person menaced to shoot him if he did not depart: the bailiff did not depart, but broke open the window to make the arrest, and the person shot him, and killed him. It was holden that this was not murder, because the officer had no right to break the house; but that it was manslaughter, because the party knew the officer to be a bailiff.⁶

(8.) Where the arrest is made without any warrant.

As will be more fully seen hereafter, not only officers of justice, but private persons are empowered to make arrests in cases where felonies can in no other way be prevented. Independently of this principle, which is not now under discussion, an officer, though without a warrant, has a right to arrest on charge of felony; and if the fact of his being an officer be known to the party attempted to be arrested, killing by the latter of the former will be murder, though no felony was in fact committed. Thus, upon an indictment for charge of maliciously wounding under the 9 Geo. 4, c. 31, it appeared that the prisoners had attempted to push a man into a ditch, upon which a scuffle

¹ Stockley's case, 1 East, P. C., c. 5, s. 58, p. 310.

² See *Housin v. Barrow*, 6 T. R. 122, and cases there cited.

³ *Stevenson's case*, 19 St. Tr., 846.

⁴ *R. v. Harris*, 1 Rus. on Cr. 621. Bayley, J.

⁵ 1 East, P. C., c. 5, s. 78, p. 311.

⁶ *Cook's case*, 1 Hale, 458; *Cro. Car.* 537; *W. Jones*, 429.

ensued. The prisoners walked on, and the man complained to Harrison, a watchman, that they had attempted to rob him, desired him to arrest them, followed them till Harrison came up to them, and then said, sufficiently loud for them to hear, "That's them." There was no evidence of any attempt by the prisoners to rob the man, and the only person who saw the transaction negatived it. When Harrison came up to the prisoners, all he said to them was, "You must go back and come along with me." He did not explain the reason why, nor was any charge against the prisoners stated. He was dressed in a watchman's coat, and had his lantern. W, one of the prisoners, said, "keep off," and drew a sharp instrument from his side; the watchman said, "it's of no use, you must go back." A third man put himself in a position as if to strike the watchman, and W made a spring at him, and caught one of the skirts of his coat; the watchman pulled out his staff, and turned at the prisoners, and they came at him. The watchman struck at W, and hit him on the thick part of the arm with his staff; W immediately stabbed the watchman, and another of the prisoners followed the watchman, and made another blow at him with another knife. The place where the prisoners attempted to push the man into the ditch was within the limits of the hamlet, for which Harrison was watchman, but the place where he overtook the prisoners did not appear to be within those limits. The jury found that the prisoners knew Harrison to be a watchman. Mr. Baron Bayley doubted whether, as no felony had been committed, and there had been no breach of the peace in Harrison's presence, he could legally arrest, at least without first stating to the prisoners why he purposed to arrest, and he also doubted his power out of the limits of his hamlet; and he reserved the case for the opinion of the judges, nine of whom held that the watchman could legally arrest the prisoners without saying that he had a charge of robbery against them, though the prisoners had in fact done nothing to warrant the arrest; and that had death ensued, it would have been murder. Four of the judges¹ were of a contrary opinion.²

A class of statutes exist both in England and in this country which give authority not only to constables but also to private persons to apprehend persons *found committing* certain offences specified in such statutes. In these cases it is requisite that the authority to apprehend should be strictly pursued, and the party supposed to be guilty must be apprehended either committing the offence, or upon immediate and fresh pursuit.³

Where there is a reasonable suspicion that a felony has been committed, and a charge has been made against a particular defendant connecting him with it, killing the officer who arrests the defendant will be murder, though he has no warrant, and though the charge does not in terms express all the particulars necessary to constitute the felony. Thus, when the prisoner had produced a forged bank note; and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and taken to a

¹ Bayley, B., Park, J., Littledale, J., and Bosanquet, J.

² R. v. Woolmer, R. & M. C. C. R. 334.

³ R. v. Curran, 3 C. & P. 397; Hanway v. Boulton, 1 Moo. & Rob. 14; R. v. Frazer, R. & M. C. C. R. 419; 1 Russ. on Cr. 605.

constable, and delivered with the note to the constable; and the charge to the constable was, "because he had a forged note in his possession." After he had been in custody at the constable's some hours, namely, from six o'clock in the evening until eleven, the constable was handcuffing him to another man, when he pulled out a pistol and shot the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. 3, c. 58; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing the officer (if that had taken place) would have been only manslaughter. But the prisoner having been convicted, and the case reserved for the consideration of the judges, they were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been considered as imputing to the prisoner a guilty possession.¹ In a case, however, which has been already stated, where an arrest by a constable would have been clearly illegal; an attempt to make it under the circumstances was held to be such a provocation as would have reduced the case to manslaughter if death had ensued. The indictment was for stabbing and cutting with intent to murder upon the 43 Geo. 3, c. 58. On the trial it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work; that he applied again subsequently, was again refused, and became abusive, upon which his master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up stairs and pack up his tools, and that no constable should stop him. He went up stairs, came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first bloody constable that offered to stop him; that he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to a constable to take the prisoner into custody; making no charge further than saying that he suspected the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if the master would give him charge of him; and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there; the privy had no door to it. The master said, "that is the man, and I give you in charge of him;" upon which the constable said to the prisoner, "My good fellow, your master gives me charge of you, you must go with me." The prisoner, without saying anything, presented the knife, and stabbed the constable under the left breast; and attempted to make several other blows which the constable parried off with his staff. The constable then aimed a blow at the prisoner's head, upon which he ran away with the knife. The knife had struck against one of the constable's ribs and glanced off; if it had struck two inches lower, death would have ensued; but the wound as it happened was not considered dangerous. The prisoner having been

¹ R. v. Ford, Russ. & Ry. 329.

found guilty, upon a case reserved, the majority of the judges present, namely, Abbott, C. J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J., held that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only; and that therefore the conviction was wrong. Holroyd, J., and Burrough, J., thought otherwise.¹

2d.—*Ship's Officers.*

Where an officer of a British ship of war, in the year 1769, attempted, without a special warrant, to impress several seamen in a Massachusetts merchant vessel, and was killed in the attempt, it was held but manslaughter, the deceased acting without authority.²

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats; had ammunition given to him when he was put upon guard; and acted under the mistaken apprehension that it was his duty. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly on them to keep off; but one of them persisted and came close under the ship: and he then fired at a man who was in the boat, and killed him. It was put to the jury to find, whether the sentinel did not fire under the mistaken apprehension that it was his duty: and they found that he did. But a case, being reserved, the judges were unanimous that it was, nevertheless, murder. They thought it, however, a proper case for a pardon: and, further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.³

3d.—*Private Persons.*

As has already been generally observed, every one coming to the aid of the officers of justice, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself.⁴ A person aiding a policeman in conveying a person suspected of felony to the station-house is entitled to the same protection *eundo, morando, et redeundo* as the policeman. The deceased having been required by a

¹ *R. v. Thompson*, 1 Ry. & Mood. 80. Best, C. J., and Alexander, C. B., were absent.

² Case of the crew of the Pitt packet, 4 Boston Law Reporter, 369.

³ *R. v. Thomas*, 1 Rus. on Cr. 614.

⁴ 1 Hale, 462, 463; Fost. 309. See also, *post*, 77.

policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death; and it was objected that he was not at the time aiding the policeman, Colman, J., said, "He is entitled to protection *eundo, morando, et redeundo*." The same sanction is, with certain restrictions to be hereinafter stated, extended to the cases of private persons interposing for preventing mischief from an affray, or using their endeavours to apprehend felons, or those who have given a dangerous wound, and to bring them to justice: such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice.²

While it is clear that a private person is not only justified but obliged to do his best to bring felons to justice, as well as to prevent felony,³ a party interfering on this principle, should be clear, first, that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested;⁴ and, second, that it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavouring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprized of the truth of the fact, the other not having submitted and rendered himself to justice.⁵

Where there is a clear case of an attempt to commit a felony, such arrest may be also made. Thus, where H., being called up in the night by one of his servants, found that his stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found, by which the door of the stable appeared to have been cut, and some house-breaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by H. and his servant, and during such detention, and in the course of the same night, the prisoner had cut H.'s servant with a knife, a point was made that such cutting was not within the 43 Geo. 3, c. 58, on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the judges held that the prisoner

¹ R. v. Phelps, 1 C. & Mars. 180. See the Sissinghurst-house case, *ante*, p. 62, post. p. 77.

² Fost. 309.

³ *Ex parte* Kraus, 1 B. & C. 261; 1 Russ. on Cr. 535. See more fully, Com. v. Daily, Com. v. Hare, Appendix.

⁴ 2 Inst. 52, 172; Fost. 318; Samuel v. Payne, Dougl. 359; and in *Coxe v. Winan*, Cro. Jac. 150, it was holden, that, without a fact, suspicion is no cause of arrest; and 8 Ed. 4, 3; 5 Hen. 7, 5; 7 Hen. 4, 35, are cited.

⁵ 1 Hale, 490; Fost. 318. See *State v. Rutherford*. 1 Hawks' N. C. Rep. 457,

being detected in the night attempting to commit a felony, might be lawfully detained without a warrant, until he could be carried before a magistrate.¹

Upon an indictment for wounding, it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ash-pit, which he was permitted to do; as he was carrying away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle, which had stood on a shelf near the ash-pit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife: a rattle of copper had been heard while the prisoner was at the ash-pit: it was objected that the prosecutor had no right to detain the prisoner. Alderson, B., "That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony."²

An indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon: but it is said, that if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out: otherwise, they will be guilty of manslaughter.³

Private persons interfering for the furtherance of public justice should expressly avow their intention, or their killing will be but manslaughter.⁴ If the intention, however, be shown, the law is otherwise. Thus, in a case already cited, the prisoner and one W. engaged in a fight, and were separated by the deceased; some time after the fight was renewed, and the deceased again interfered, but being unable to take the prisoner off, called a negro to his assistance who, in the act of separating the combatants, threw the prisoner against the wall. The prisoner then made at the deceased (who endeavoured to avoid him) with a knife, and inflicted a mortal wound; it was held that this was a case of murder.⁵

A. beat B., a constable who was in the execution of his office, and they were parted; and then C., a friend of A., rushed suddenly in, took up the quarrel, fell upon the constable, and killed him in the struggle; but A. was not engaged in this after he was parted from B. And it was holden by two judges, that this was murder only in C.; and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to abuse the constable.⁶ But if a man begin a riot, and the same riot continue, and an officer be killed, he that began the riot would, if he remained present at it, be a principal murderer, though he did not commit the fact.⁷

The right of private persons to arrest in cases of misdemeanor

¹ R. v. Hunt, Ry. & Mood. Cr. C. 93.

² R. v. Price, 8 C. & P. 282, Alderson, B.

³ Dalt. C. 170, s. 5; 1 East, C. P., c. 5, s. 68, p. 301.

⁴ Fost. 310, 311; U. S. v. Travers, 2 Wheeler's C. C. 510; 1 East, P. C., c. 5, s. 58, p. 510.

⁵ State v. Ferguson, 2 Hill S. C. R. 619.

⁶ 1 East, P. C. 296.

⁷ R. v. Wallis et al., 1 Salk. 334.

has been already partially noticed,¹ and will be considered more fully in a succeeding section.²

II. IN WHAT CASES.

1st. *Felonies.*

The rule of law bearing on this point has already been stated in the pages immediately preceding.³ It is sufficient now to recapitulate what has been there said, that a more liberal construction of the right to arrest exists in felonies than in misdemeanors. If a felony be committed and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours to prevent an escape; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit will be under the same protection of the law; and the same rule holds, if a felon, after arrest, break away as he is being carried to jail, and his pursuers cannot retake him without killing him.⁴ Thus, where, upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder.⁵

A peace officer may justify an arrest on a charge of felony, on reasonable cause of suspicion, without a warrant; although it should afterwards appear that no felony had been committed.⁶ And where a private person suspecting another of felony, has laid his grounds of suspicion before a constable, and required his assistance to take him, the constable may justify killing the party, if he fly, and cannot otherwise be taken, though in truth he were innocent. But in such case, where no hue and cry is levied, the party suspecting ought to be present, as the justification must be that the constable did aid him in taking the party suspected: and the constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it.⁷ A police officer found N. with potatoes under his shirt, which had been very recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so, and a rescue being attempted, O. was going away, and was struck by A., who went away,

¹ *Ante*, p. 71.

² *Post*, p. 75. "There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." *Beckworth v. Philby*, 6 B. & C. 638.

³ *Ante*, p. 56, 7.

⁴ 1 Hale, 489, 490; 1 Hawk. P. C., c. 28, s. 11; Fost. 309; 1 East, P. C., c. 5, s. 67, p. 298.

⁵ Jackson's case, 1 Hale, 464.

⁶ *Samuel v. Payne*, Dougl. 359.

⁷ 2 Hale, 79, 80, 91—3; 3 Inst. 221; 1 East, P. C., c. 5, s. 69, p. 301.

and O. was afterwards killed by other persons who attempted the rescue; it was held that the police officer had no right to apprehend N., and that the killing of O., therefore, did not amount to murder.¹

2nd.—*Misdemeanors.*

No matter what may be the case of misdemeanor, there is no power in a private person to apprehend after the offence has been committed. Thus to trespass for false imprisonment, the defendant pleaded that an evil-disposed person, to him unknown, had obtained goods from him by false pretences; that the plaintiff afterwards passed by the defendant's shop, and was pointed out to him by his servant as the person who had so obtained the goods, whereupon the defendant, vehemently suspecting that the plaintiff was the person who had committed the offence, gave charge of him to a police officer to be taken before a magistrate; and upon this plea the defendant had a verdict. It was contended, in showing cause against a rule for judgment *non obstante veredicto*, that offences partaking of the nature of a felony, as a fraud, which borders upon a theft, might come under a different rule from misdemeanors, which merely constituted a breach of the peace. But Lord Tenterden, C. J., said, "The distinction between felony and misdemeanor is well known and recognised, but is there any authority for distinguishing between one kind of misdemeanor and another?" It was admitted that there was no direct authority, but 2 *Hawk.*, P. C. c. 12, s. 20, and 2 *Hale*, 88, 89, were relied upon. Lord Tenterden, C. J. "The instances in *Hawkins* are where the party is caught in the fact, and the observation there added assumes that the party was guilty. Here the case is only of suspicion. The instances in *Hale*, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that the parties should apply to a justice of peace for a warrant, than take the law into their own hands, which they are too apt to do. The rule must be made absolute."²

Where private persons interpose in the case of sudden affrays, to part the combatants, and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray, who shall kill the party so interposing: but it will not be murder in the other affrayer, unless he also strike the party.³

The same doctrine applies to officers arresting parties without warrant, on a charge of misdemeanor reported to have been committed. Thus, if a constable take a man without warrant, upon a charge of ill using a person, which ill usage was not in the presence of the constable, and, therefore, gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because the arrest is illegal, and J. S. ought to have known it was, and then his attempt to retake was illegal also; and that though the prisoner, while in custody of the constable, struck the man by whom the charge was given; because a blow whilst he was under the

¹ *R. v. Phelps*, 1 Car. & Mars. 180.

² *Fox v. Gaunt*, 3 B. & Ad. 798.

³ *Fost.* 272; 1 East, 304.

influence of the provocation from the illegal arrest caused by such man, would not justify the constable in detaining him: at least it will make no difference if the blow was not likely to be followed with dangerous consequences, nor made a new and distinct ground of detainer. Upon an indictment for maliciously cutting Walby, it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so misusing him; on which the constable, meeting the prisoner passing along the highway, ordered him to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a magistrate, and ordered Walby to assist him, which W. did, and to which the prisoner submitted. No particulars of what the supposed ill usage or insult consisted of, appeared in evidence, *nor did they pass in the constable's view or hearing*, and, therefore, the apprehension and detainer appeared clearly thus far to have been unlawful. Afterwards, and whilst the prisoner was thus in custody, and before they found a magistrate, the prisoner struck the man, in the constable's presence, who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate; and some time afterwards, as they were proceeding along to a magistrate's, the prisoner ran away, and attempted to escape, but was pursued by W. by the constable's order; and being overtaken by him, refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick, which W. then had in his hand, and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let go he would stab him, and then gave him the cut in the face, for which he was thus indicted. Holroyd, J., doubted whether the effect of the first illegal custody might not operate upon the circumstances that subsequently took place, as a defence against the present indictment, either in rendering even the subsequent imprisonment tortious, or depriving the prisoner's conduct of the necessary legal ingredient of malice; and he reserved the case for the opinion of the judges, who held that the original arrest was illegal, and that the recaption would have been illegal, and, therefore, the case would not have been murder if death had ensued.¹

Even a justice of the peace has no authority to detain a person known to him, till some other person makes a charge against him: before he detains a person known, he ought to have a charge actually made. Upon an indictment for false imprisonment and assaulting one Smyth, it appeared that Smyth went to a police office, where two magistrates were sitting, to make a complaint, which was dismissed, and he was retiring, when one of the magistrates said, "Stop him, shut the door, don't let that man escape. Where is the person that has got the information to lay against him for tampering with the due course of justice?" On which he was detained. For the defendants it was opened, that the magistrates were informed that an officer

¹ R. v. Curvan, R. & M. C. C. R. 132.

had a complaint to make against Smyth for having tampered with the due course of justice; and that the officer not being then at the office, Smyth was detained till he was sent for; and it was contended that, if a magistrate has a person before him charged with either felony or misdemeanor, he may either go into the case immediately, or detain the party to await his pleasure. Lord Tenterden, C. J. said, "I am of opinion that the justices could not detain a person known to them, till some other person should make a charge; I think before they detain a known person, they should have a charge actually made."¹

Where, however, life is threatened, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace.²

Upon an indictment for maliciously stabbing with intent to murder, it appeared that the prisoner, about half-past ten at night, went to a house and demanded to see the servant girl. He was desired to quit the house, which he refused to do, and the prosecutor who was a constable, was sent for. Before the prosecutor came, the prisoner left the house and went into the garden. In about twenty minutes the prosecutor came. The prisoner did nothing in his presence; but upon the prisoner saying, "If a light appear at the windows, I will break every one of them," the prosecutor took him into custody, and he afterwards cut the prosecutor with a knife; it was submitted that the arresting the prisoner was illegal, as nothing had been done by him in breach of the peace in the presence of the constable. Parke, J. I think that the detention of the prisoner by the prosecutor was illegal. There was no breach of the peace when the prisoner was taken into custody."³

3d.—Affrays.

The principal questions arising under this head will be more fully discussed in a subsequent chapter, where homicide arising in riots is considered.⁴ At present it is intended to do no more than notice the English cases bearing on this particular head, reserving the American authorities for a more full discussion hereafter.

The leading English case on this point is thus stated:—A great number of persons, assembled in a house called *Sissinghurst*, in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, *viz.*, A, was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend the said A, and divers other persons unknown, who were all together in *Sissinghurst*-house. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's war-

¹ R. v. Birnie, 5 C. & P. 200.

² 2 Hale, 88. This power seems to be grounded on the duty of the officer to prevent a probable felony, and must be governed by the same rules which apply to that case; though Dalton, (ch. 116, s. 3.) extends it even to the prevention of a battery. *Vide* 1 East, P. C., c. 5, s. 72, p. 306.

³ R. v. Bright, 4 C. & P. 387.

⁴ See as to interference of private persons, ante, p. 71.

rant, and demanded A, with the rest of the offenders that were then in the house; and one of the persons within came, and read the warrant, but denied admission to the constable, or to deliver A or any of the malefactors; but, going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away; and being about five rods from the door, B, C, D, E, F, &c., about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A and one G that read the warrant were two. For this, A, B, C, D, E, F, G, and divers others, were indicted of murder, and tried at the King's Bench bar, when these points were unanimously determined:

1. That although the indictment were, that B gave the stroke, and the rest were present aiding and assisting, though in truth C gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in *Mackally's* case.¹

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rods of the house, and in view thereof, and all done as it were in the same instant.

4. That here was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the same vill. 2. Because he notified his business at the door before the assault, *viz.*, that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, the constable commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

5. It was resolved, that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A, yet the killing of the assistant of the constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary, when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring; but this point was not relied upon, because there was enough upon the former point to convict the offenders. In the conclusion, the jury found nine of them guilty, and acquitted those within; not because they were abused, but because there was no clear evidence that they consented to the assault as the jury thought; and therefore judgment was given against the nine to be hanged.

While it is well settled, as has been stated, that a constable or other peace-officer has no right to arrest *after an affray* without a warrant, yet it is clear that he, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take part in the resistance; there being either implied or express notification of the character in which he interposed.¹

What degree of notice is required to acquaint parties with the fact of office has been already partially considered.² In such cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially if it be in the day time.³ In the night some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient.

It becomes, under the law as just stated, an important inquiry whether an affray be actually over, for on this depends the question how far an arrest made without warrant is legal. Thus, upon the trial of an action for an assault, it appeared that about midnight there was a disturbance, and ringing and knocking at many doors; that the disturbance continued about three hours, and about three o'clock in the morning the high constable asked the plaintiff to assist him in taking the parties into custody, and that the plaintiff went into the street, and that one White desired the defendant to go home, and the defendant replied, "If you do not leave me alone, I will knock your brains out, or give you a good ducking," whereupon the plaintiff and White laid hold of the defendant to convey him to the cage; and when near the cage door, all three fell down; and it was imputed that at this time the defendant kicked the plaintiff on the leg, which was the injury for which the action was brought. Alderson, B., said to the jury, "The questions for your consideration in this case are, whether the defendant was engaged in the affray; whether the constable had view of the affray while he was so engaged in it; and whether the affray was continuing at the time that he ordered the plaintiff to apprehend

¹ 1 Hale, 463; 1 Hawk. P. C., c. 31, s. 54; Fost. 310.

² Ante p. 60, 73.

³ 1 Hale, 361; Fost. 311.

the defendant. If you are satisfied that all these points are made out, then, if the defendant assaulted the plaintiff while the plaintiff was endeavouring to apprehend him, such assault is unjustifiable, and the verdict ought to be for the plaintiff. If, however, there had been an affray, and that affray were over, then the constable had not, and ought not, to have the power of apprehending the persons engaged in it: for the power is given by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate. You must, therefore, before you find for the plaintiff, be satisfied that the defendant was a party to the affray, and that the affray was continuing at the time of his apprehension. The right of the plaintiff to apprehend the defendant is a serious question, involving the power of constables, and a wrong decision upon it would materially affect the liberty of the subject. The words used by the defendant would be no justification for his apprehension, unless he was a party to the affray; and you think that those words showed that the affray was still continuing. If the apprehension of the defendant were unlawful, he had, unquestionably, a right to struggle to get away; but, if the apprehension was lawful, he had no right to do so, and is answerable for all the consequences."¹

Questions not unfrequently arise, says Sir Wm. Russell,² as to the authority of constables and other officers to interfere with persons in inns or beer houses. It is no part of a policeman's duty to turn a person out of an inn, although he may be conducting himself improperly there, unless his conduct tends to a breach of the peace. The plaintiff was using abusive language in an inn to one of the persons there, on which the owner of the inn sent for a policeman, who, by his direction, took the plaintiff to the station house. Patteson, J. "The landlord of an inn or public house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did, is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out by force, and may call in his servants to assist in so doing. He might also authorize a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law; but although it would be no part of the policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do."³ Neither is it the duty of a policeman to prevent a person from going into a room in a public house, unless a breach of the peace was likely to be committed by such person in that room. Upon an indictment for assaulting a policeman in the execution of his duty, it appeared that the policeman was called into a public house to put an end to a disturbance which the defendant was making; he and the landlady were at high words: W. L. interfered, and the defendant was in the act of squaring at him, when the policeman desired the defendant not to make a disturbance; the defendant, who was at the side of the bar,

¹ Cook v. Nethercote, 6 C. & P. 417.

³ Wheeler v. Whiting, 9 C. & P. 262.

² 1 Rus. on Cr. 602.

then attempted to go into the parlour, in which a person was sitting as the defendant attempted to get into the parlour, the policeman collared him, and prevented his going in; he then struck the policeman; neither the landlord nor landlady had desired the policeman to turn the defendant out of the house. Parke, B. said: "The policeman had a right to be in the house, without being called upon either by the landlord or landlady to interfere, but under the circumstances he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlour; and if you think it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlour."¹

But if a person make such a noise and disturbance in a public house as would create alarm and disquiet the neighbourhood, this would be such a breach of the peace as would justify a policeman in taking the party into custody, provided it took place in the presence of the policemen. To trespass for false imprisonment the defendant pleaded that he was possessed of a public house, and that plaintiff was in the house, and conducted himself in a riotous, quarrelsome, disorderly, and uncivil manner, and committed a breach of the peace therein; that the plaintiff was requested to depart, and refused, whereupon the defendant gently laid his hands on the plaintiff to remove him, and because the plaintiff violently and forcibly resisted the said removal, the defendant gave him in charge to a watchman, who saw the said breach of peace; it appeared that a watchman, who was on duty, in consequence of hearing a noise, went into the defendant's public house, where he found the plaintiff and five or six other young men making a disturbance; he led the plaintiff out of the house, and about fifteen yards along the street, and then let him go; he said he would go back and have his revenge, and went towards the public house: the watchman went round his beat, and on his return he heard a person at the door of defendant's house cry "watch," and he in consequence went in and found the plaintiff sitting down; he then sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar, to resist being put out, on which the watchman took the plaintiff into custody, and took him to the watch-house. Parke, B. said: "There is no doubt that a landlord may turn out a person who is making a disturbance in a public house, though such disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord; and if the watchman in this case saw such assault committed, that would make out the plea. There might, it is true, be a sufficient breach of the peace to justify the defendant, as the landlord of the house, in giving the plaintiff into custody without this assault; and even if there was no assault at all. For if the plaintiff made such a noise and disturbance as would create alarm and would disquiet the neighbourhood, and the persons passing along the adjacent street, that would be such a breach of the peace as would

¹ R. v. Mabel, 9 C. & P. 474, Parke, B.

not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman: the watchman has said he saw the piece of work the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighbourhood, this would justify the watchman in turning the plaintiff out, and in taking him into custody, if on his going to the house the second time he found the plaintiff still there."¹

4th.—*Street-Walkers and Vagrants.*

The present and more humane opinion in this respect is, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer.²

The city officers of the city of St. Louis arrested the defendant as a vagrant, under the city ordinances, and discharged him again upon his promise that he would leave the city within a specified time. After the time had elapsed, the deceased again, without a warrant, arrested defendant under an order from the head of the police, and was killed by defendant in resisting the arrest. It was held that if the arrest by deceased was made solely because defendant had broken his promise to leave the city, it was illegal; but if made because the defendant was at the time a vagrant within the meaning of the city ordinances, then it was legal.³

III.—WHEN THE ARREST MAY BE MADE.

The officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority. But process may be executed in the night time as well as by day.⁴

A serjeant at mace in the city of London having authority according to the custom of the city, by entry in the porter's book at one of the counters, to arrest one Murray for debt, arrested him between five and six in the evening of the 8th of November, saying at the same time, "I arrest you in the king's name, at the suit of Master Radford;" but he did not produce his mace: Murray resisted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal, that the serjeant should have

¹ Howell v. Jackson, 6 C. & P. 723, Parke, B.

² Tooley's case, 2 Lord Raym. 1296. It is said that watchmen and beadles have authority, at common law, to arrest, and detain in prison, for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of felony having been committed. (Lawrence v. Hedger, 3 Taunt. 14.) And it has been said by Hawkins and others, that every private person may, by the common law, arrest any suspicious night-walker, and detain him till he give a good account of himself, (2 Hawk. P. C., c. 13, s. 6, c. 12, s. 20;) and it has been held that a person may be indicted for being a common night-walker, as for a misdemeanor. (2 Hawk. P. C., c. 12, s. 20; Latch. 173; Poph. 208.)

³ Roberts v. State of Missouri, 14 Misso.

⁴ 9 Co. 66 a; 1 Hale, 457; 1 Hawk. P. C., c. 31, s. 62.

shown his mace, and that a custom stated in the verdict to arrest without process first against the goods was illegal; but the objections were overruled; and judgment was given for the king, and one of the prisoners was executed.¹

Killing a watchman in the execution of his office is not the less murder for being done in the night; and the killing of an officer who arrests on civil process may be murder, though the arrest be made in the night; and in the case of an affray in the night where the constable, or any other person who comes to aid him to keep the peace, is killed, after the constable has commanded in the king's name to the keeping of the peace, such killing will be murder; for though the parties could not discern or know him to be a constable, yet if it were said at the time that he was such officer, resistance was at their peril.²

IV.—OFFICERS TAKING OPPOSITE PARTS.

Where officers, accidentally and without malice, take opposite parts in an affray, and one of them is killed, this, says Lord Hale, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other:³ but upon this it has been remarked, that perhaps it had been better expressed, to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties; they acted altogether out of the scope of their characters as peace officers, and without any authority whatever.⁴ If the sheriff, says the same authority, have a writ of possession against the house and lands of A., and A. pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ.⁵ And in a subsequent case, some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and as it was thought for some time had killed her: whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, he proceeded to take them into custody upon the charge of murder; and at first, offered to take care also of their prisoner, but the latter was soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly.⁶

¹ Mackalley's case, 9 Co. 65 b.

² 9 Co. 66 a.

³ 1 Hale, 460.

⁴ 1 East, P. & C., c. 5, s. 71, p. 304.

⁵ 1 Hale, 460.

⁶ Anon. Exeter Sum. Ass. 1798; 1 East, P. & C., c. 5, s. 71, p. 305.

V.—HOW ARRESTS MAY BE MADE, AND HEREIN OF BREAKING OPEN DOORS.

The law on this point is thus excellently recapitulated by Sir William Russell,¹ as follows: In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.² In a case where an outer door has been broken open by two constables and a gamekeeper, to execute a warrant granted under the 22 and 23 Car. 2, c. 25, s. 2, to search for, and seize any guns, &c. for destroying game: and it appeared, that the door was broken open without the party having been previously requested to open it; the court held, that, in a case of misdemeanor, a previous demand of admittance was clearly necessary, before an outer door was broken open. Abbott, C. J., said, "It is not at present necessary to decide how far in a case of a person charged with felony it would be necessary to make a previous demand of admittance, before you could justify breaking open the outer door of the house: because I am clearly of opinion, that, in the case of a misdemeanor, such previous demand is requisite." Bayley, J., said, generally, "even in the execution of criminal process, you must demand admittance, before you can justify breaking open the outer door. That point was mentioned in the judgment of the court in *Burdett v. Abbott*."³ The question as to what should be considered as due notice was much considered in a case where two officers went to the workshop of a person, against whom they had an escape warrant; and finding the shop door shut, called out to the person, and informed him that they had an escape warrant against him, and required him to surrender, otherwise they said they would break open the door; and, upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the judges were of opinion, that no precise form of words was required in a case of this kind; and that is sufficient if the party has notice that the officer comes not as a mere trespasser; but claiming to act under a proper authority. The judges who differed, thought that the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not *ex vi termini*, nor in the notion of law, imply any degree of force, or breach of the peace; and consequently, that the prisoner had not due notice that they came under the authority of a warrant grounded on the breach of the peace; and that, for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers.⁴

The general rule both here and in England undoubtedly is, that in every case, whether criminal or civil, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the assailants proceed to that extremity.⁵ Where,

¹ 1 Rus. on Cr. 627.

² Fost. 320; 1 Rus. P. C. 627, and see also the excellent notes of Messrs. Hare and Wallace to *Semayne's case*, 1 Smith's Leading Cases, 164.

³ Lannock v. Brown, 2 B. & A. 592.

⁴ Curtis' case, Fost. 135.

⁵ Fost. 320; 2 Hawk. P. C., c. 14, s. 1; 2 Hale P. C., 117; *Kneass v. Fitler*, 2 Serg. & R. 263, 265; *Lannock v. Brown*, 2 B. & A., 592; *Glover v. Whittenhall*, 6 Hill, 597,

however, a party having been arrested escapes into his own house, the officer may, without notice, break the outer door, if the pursuit be immediate, and the defendant's conduct such as to imply a waiver of notice.¹

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced, after the notification, demand, and refusal, which have been mentioned.² So, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken.³ And it is also settled, upon unquestionable authorities, that where an injury to the public has been committed, in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it.⁴ And the officer may act in the same manner upon a *capias utlagatum*, or *capias pro fine*,⁵ or upon an *habere facias possessionem*.⁶ The same force may be used where a forcible entry or detainer is found by inquisition before justices of peace, or appears upon their view;⁷ and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute, which gives the whole or any part of such penalty to the king.⁸ But in this latter case the officer executing the warrant must, if required, show the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken.⁹

But though a felony has been actually committed, yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion.¹⁰ For where a person lies under a probable suspicion only, and is not indicted, it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified;¹¹ or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty.¹² But a different doctrine appears to have formerly prevailed upon this point; by which it was held, that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable might break open doors, though he had no warrant.¹³

It is said, that if there be an affray in a house, the doors of which

591: *State v. Armfield*, 2 Hawks, 246; *Curtis v. Hubbard*, 1 Hill N. Y., 337; *Dent v. Hancock*, 5 Gill, 120, 126; *People v. Hubbard*, 24 Wend. 369; *State v. Hooker*, 17 Vermont, 659; *Hooker v. Smith*, 19 Vermont, 659.

¹ *Allen v. Martin*, 10 Wend., 300.

² *Fost.* 320; 1 Hale, 459. And see 2 Hawk. P. C., c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person. And see *De Gondouin v. Lewis*, 10 A. & E. 120.

³ *Fost.* 320; 1 Hale, 459; 2 Hawk. P. C., c. 14, s. 3; *Curtis' case*, *Fost.* 135.

⁴ *Burdett v. Abbott*, 14 East, 157, where the process of contempt proceeded upon the order of the House of Commons; and see *Semayne's case*, Cro. Eliz. 909; and *Brigg's case*, 1 Rol. Rep. 336.

⁵ 1 Hale, 459; 2 Hawk. P. C., c. 14, s. 4.

⁶ 1 Hale, 458; 5 Co. 95 b.

⁷ 2 Hawk. P. C., c. 14, s. 5.

¹⁰ *Fost.* 321.

¹² 1 East, P. C., c. 5, s. 87, p. 322.

¹¹ 2 Hawk. P. C., c. 14, s. 6.

⁹ 27 Geo. 2, c. 20.

¹¹ 2 Hawk. P. C., c. 5, s. 87, p. 322.

¹³ 1 Hale, 583; 2 Hale, 92; 13 Ed. 4, 9 a.

are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger;¹ and it is also said, that if there be disorderly drinking or noise in a house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder.² And further, that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers, in either case, he may justify breaking open the doors.³

But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of the measure for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his family, is admitted; and accordingly, in such cases, an officer cannot justify the breaking open an outward door or window to execute the process.⁴ If he do so, he will be a trespasser; and if the occupier of the house resist him, and in the struggle kill him, the offence will be only manslaughter; for if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion that the house is broken with a felonious intent, the killing such officer will be no felony.⁵

Sir W. Russell, in the chapter from which the present section is principally drawn, thinks that this rule of every man's house being his castle has been carried as far as the true principles of political justice will warrant, and that it will not admit of any extension.⁶ In this country, however, there is a tendency to extend the line even still farther, it having been held that where one of the family, upon the approach of an officer, ran into the house, attempting unsuccessfully to close the door, and the officer then forced the door entirely open, he was liable to indictment.⁷

Outward doors or windows are such as are intended for the security of the house, against persons from without endeavouring to break in;⁸ but if the officer find the outward door open, or it be opened to him from within, he may then break open any *inward* door, if he find that necessary in order to execute his process.⁹ Thus, it has been holden that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger.¹⁰ And it has been decided, that a sheriff's officer in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of

¹ 2 Hale, 95.

² 2 Hale, 95; and it is added, "This is constantly used in London and Middlesex." But see *ante*, p. 294-5, &c.

³ 2 Hawk. P. C., c. 14, s. 8.

⁴ Cook's case, Cro. Car. 537; Fost. 319.

⁵ 1 Hale, 458; 1 East, P. C., c. 5, s. 87, p. 321-2.

⁶ Fost. 319, 320.

⁷ State v. Armfield, 2 Hawks, 246.

⁸ Fost. 320.

⁹ 1 Hale, 458; 1 East, P. C., c. 5, s. 87, p. 323.

¹⁰ Lee v. Gansel, Cowp. 1.

B., a person residing in such house; B. having refused to open the door of the room, after being informed by the officer that he had a warrant against him.¹ It was once thought that if the party, against whom the process is issued, *be not within the house* at the time, the officer can only justify breaking open doors in order to search for him; after having first demanded admittance,² but it has been since ruled that in case the person, or the goods of the defendant, are contained in the house which the officer has entered, he may break open any door within the house without any further demand.³ If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as if they are not, he will not be justified.⁴

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open) and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and, the officer prevailing, the prisoner shot at and killed him; it was held to be murder.⁵

The privilege only extends to the dwelling-house, but it should seem that within that term are comprehended all such buildings as are within the curtilage, and as are considered as parcel of the dwelling-house at common law. In trespass the defendant justified an entry into a close and breaking into a barn under a *feri facias*; the plaintiff replied that the door of the barn was shut, and it was adjudged upon demurrer that in such a case the sheriff can break open the door of the barn without a request, in order to take the goods; for it shall be intended to be a barn in a field, and not a barn which is parcel of a house. For the court agreed that if the barn had been adjoining to and parcel of the house, it could not be broken open.⁶

This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their domicile, their ordinary residence, there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary.⁷ But it should be ob-

¹ Lloyd v. Sandilands, 2 Moore, 207; 8 Taunt. 250. See Hodgson v. Towing, 5 Dowl. P. R. 410.

² Ratcliffe v. Burton, 3 Bos. & Pull. 223.

³ Per Gibbs, J., in Hutchinson v. Birch et al., 4 Taunt. 619.

⁴ Cook v. Birt, 5 Taunt. 765; Johnson v. Leigh, 6 Taunt. 246.

⁵ Baker's case, 1 Leach, 112; 1 East, P. C., c. 5, s. 87, p. 323. It should be observed, that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment. See 1 Rus. on Cr. 617.

⁶ Penton v. Browne, 1 Sid. 186. See the authorities as to what is comprehended under the term dwelling-house at common law. Wh. Cr. Law, 2d ed., 516, 535.

⁷ Fost. 320; 5 Co. 93. Mr. Smith, in his learned note to Semayne's case, 1 Sm. Lead. C. 45, after citing the observations of Lord Loughborough in Sheere v. Brookes, 2 H. Bl. 120, says, "It seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal."

served, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant.¹ And an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there, he is a trespasser.² And it has been decided that a sheriff cannot justify breaking the inner doors of the house of a stranger, *upon suspicion* that a defendant is there, in order to search for such defendant, and arrest him on mesne process.³

And the privilege is also confined to *arrests in the first instance*. For if a man, being legally arrested,⁴ escape from the officer, and take shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused.⁵ If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate; and it should be observed, that the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal.⁶ Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants; it was ruled to be only manslaughter.⁷

In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty.⁸ So where a sheriff being lawfully in a house makes a lawful seizure of the goods of the owner of the house, and cannot take the goods out of the house without opening the outer door, and neither the owner nor any one else

¹ 2 Hale, 103; Fost. 321; 1 East, P. C., c. 5, s. 87, p. 324. Mr. Smith, in the same note, says, "There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favouring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter." It certainly is reasonable in such a case, that the party should not be permitted to show that in fact the defendant was not concealed in this house, and this would be in accordance with the principle established by *Pickard v. Sears*, 6 A. & E. 469; *Heane v. Rogers*, 9 B. & C. 586; *Kieran v. Sanders*, 6 A. & E. 515; and *Gregg v. Wells*, 10 A. & E. 90—in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. See 1 Rus. on Cr. 632.

² *Cooke v. Birt*, 5 Taunt. 765. See 1 Russ. on Cr. 632, from whence this section is taken.

³ *Johnson v. Leigh*, 6 Taunt. 246.

⁴ Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest, Fost. 320. But bare words will not make an arrest: the officer must actually touch the prisoner. *Genner v. Sparkes*, 1 Salk. 79; *Berry v. Adamson*, 6 B. & C. 528.

⁵ Fost. 320; *Genner v. Sparkes*, 1 Salk. 79; 1 Hale, 459; 2 Hawk. P. C., c. 14, s. 9. See *Allen v. Martin*, 10 Wend. 300.

⁶ 1 East, P. C., c. 5, s. 87, p. 324.

⁷ *Stevenson's case*, 10 St. Tr. 462.

⁸ 2 Hawk. P. C., c. 14, s. 11; 1 East, P. C., c. 5, s. 87, p. 324.

is there so that he can request them to open the door, he may break the door open to take out the goods.¹ It is enough to make the sheriff, in a civil case, a trespasser, that the outer door be shut, for the mere opening, as has been ruled in New York, is a breaking in law, whether it be the bursting of a bolt, the lifting of a latch, or the sliding down of a window fastened by pulleys.² Whatever is breaking in burglary, is breaking in the present connexion.³

VI. HOW FAR THIRD PARTIES MAY RESIST.

The leading case decided under this head is as follows:—One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul, Covent Garden, where he was no constable, and consequently had no authority, and there took up one Anne Dekins, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom Bray had no warrant. The prisoners came up; and, though they were all strangers to the woman, drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he showed them his constable's staff, declared that he was about the Queen's business, and intended them no harm. The prisoners then put up their swords; and Bray carried the woman to the round-house in Covent Garden. A short time afterwards, the woman being still in the round-house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners; upon which a person named Dent came to his assistance; and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. This case was elaborately argued; and the judges were divided in opinion; seven of them holding that the offence was manslaughter only, and five that it was murder. The seven judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned; and they also thought that the prisoners, in this case, had sufficient provocation: on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, and much more where it is done under a colour of justice;⁴ and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob.⁵

In Hugget's case,⁶ which was relied on in the foregoing, it appeared

¹ *Pugh v. Griffith*, 7 A. & E. 827.

² *Curtis v. Hubbard*, 1 Hill N. Y. R. 337; 4 *Ibid.* 437.

³ See Wh. C. L. (2d ed.) 512.

⁵ See 1 Russ. on Cr. 633.

⁴ *R. v. Tooley*, 2 Ld. Raym. R. 96.

⁶ *Hugget's case*, Kel. 59.

that Berry and two others pressed a man without any warrant for so doing; to which the man quietly submitted, and went along with them. The prisoner with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry showed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry; whereupon Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. But this case is stated very differently by Lord Hale, as having been under the following circumstances:—A press-master seized B. for a soldier; and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.; and by the advice of all the judges, except very few, it was held to be but manslaughter.¹ In the opinion of Foster, J., whose views on this point are even peculiarly authoritative, the cases just cited, with that of Sir Henry Ferrers,² did not warrant the doctrine laid down by the seven judges in the case of Tooley; and he has animadverted upon that doctrine with much force, viewing it as having carried the law in favour of private persons officially interposing in case of illegal arrest further than sound reason, founded on the principles of true policy, will warrant.³ After observing that, in Hugget's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began; whereas, though in Tooley's case the prisoners had, at the first meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party; and also in that case there was no possibility of rescue, the woman having been secured in the round-house; he says that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge for what had before passed, than upon hope or endeavour to assist the woman. He then proceeds, "Now, what was the case of Tooley and his accomplices, stripped of a pomp of words, and the colourings of artificial reasoning? They saw a woman, for aught appears, a perfect stranger to them, led to the round-house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna Charta and the laws; and in this frenzy to have drawn upon the constable, and killed his assistant. It is extremely difficult to conceive that the violation of Magna Charta, a fact of which they were totally ignorant at that time, could be the provocation which led them into this outrage. But, admitting for argument sake that it was, we all know that words of reproach, how grating and offensive soever, are in the eye of the law no provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of

¹ 1 Hale, 456.² Cro. Car. 378.³ Fost. 312, et seq.

his own heart, knows that affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person, though under the colour of justice, possibly can. The indignation that kindles in the breast in one case is instinct, it is human infirmity; in the other it may possibly be *called* a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection, than in human infirmity; and it is to human infirmity alone that the law indulges in the case of a sudden provocation. By this great authority *Tooles'* case was greatly shaken, and it may now be considered as entirely overruled.¹ Or if a person present at an affray interfere for the purpose of restraining the offenders and keeping the peace, and be killed;² or, if a person present when another attempts to commit a treason or felony, lay hold of him in order to prevent him, and be killed;³ the killing in these cases would be murder, whether the person arresting or interfering, &c., be a constable or not; for either has power to arrest or interfere, &c., in such a case.⁴

If the party who is arrested yield himself and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them, but not in the party arrested; but not so if he do any act to countenance the violence of the rescuers.⁵ Thus, when J. having committed a robbery, was pursued by the country upon hue and cry, and J. turned upon his pursuers, (others of the robbers being in the same field, and having often resisted the pursuers,) and refusing to yield, killed one of the pursuers; it was held, that inasmuch as all the robbers were of a company and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from J., were principals, viz., present, aiding and abetting; and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated J. to kill the party.⁶

If a constable take a man without a warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S., it is manslaughter only, because the arrest was illegal, and J. S., ought to have known it; and, therefore, the attempt to retake the prisoner was illegal also.⁷

It is agreed, says Sir Wm. Russell, that if a bailiff or other officer be resisted in the regular discharge of his duty in executing process against a party, and a third person, even the servant or friend of the party resisting come in and take part against the officer, and kill him, it will be murder, though he knew him not.⁸ But it is sug-

¹ R. v. Warner, R. & M. C. C. R. 385.

² 3 Inst. 52; 1 Hawk. c. 31, s. 21; *Fost.* 310, 311; *State v. Ferguson*, 2 Hill, S. C. R. 619.

³ 2 Hawk. c. 14, s. 19.

⁴ R. v. Hunt, 1 Mood. C. C. 93; R. v. Curvan, 3 C. & P. 397; R. v. Price, 8 C. & P. 282; and R. v. Weir, 1 B. & C. 261.

⁵ Kel. 87; R. v. Whitthorne, 3 C. & P. 394.

⁶ *Jackson's case*, 1 Hale, 464, 465.

⁷ R. v. Curvan, 1 Mood. C. C. 132.

⁸ 1 Hawk. c. 31; 4 Co. 40b.

gested, that in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority; and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would it in the servant or friend under the like ignorance.¹ The law upon this point may, perhaps, hardly seem to be reconcilable with that above-mentioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging in cool blood, in a breach of the peace, by assaulting another, instead of endeavouring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril.² And, upon this principle, if a stranger seeing two persons engaged, one of them a bailiff, attacking the other with a sword, and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff, he must abide the consequences at his peril; but if he interfere, not for the purpose of aiding one party against the other, but *with intent only to preserve the peace, and prevent mischief*, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration.³

¹ 1 East, P. C., c. 5, s. 82, p. 316.

² 1 Hawk. c. 31, s. 57; 1 East, P. C., c. 5, s. 82, p. 316.

³ 1 Rus. P. C. 627.

CHAPTER VI.

INFANTICIDE AND SELF-MURDER.

I. *Infanticide.*

To kill a child in its mother's womb, is no murder; but if the child be born alive, and die after birth through the potion or bruises it received in the womb, it is murder in the person who administered or gave them.¹ Where, also, a blow is maliciously given to a child whilst in the act of being born, as, for instance, upon the head as soon as the head appears, and before the child has breathed, it will be murder if the child is afterwards born alive, and dies thereof.² If the child has been wholly produced from the body of its mother alive, and she wilfully and of malice aforethought strangle it while it is alive, and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord.³ But it must be proved that the entire child has actually been born into the world in a living state; and the fact of its having breathed, as will be in a moment seen, is not a conclusive proof thereof.⁴

If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder.⁵

A principle of much importance bearing on this question, and one that has been more fully discussed in a previous chapter in its general relations, is, that if a person do any act towards another, who is helpless, which must, necessarily, lead to the death of that other, the crime amounts to murder; but, if the circumstances are such that the person would not have been aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind.⁶ Thus, where a woman left her child, a young infant, at a gentleman's door, or other place, where it was likely to be found and taken care of, and the child died, it would be manslaughter

¹ 3 Inst. 50; see Wh. C. L. (3d edit.,) 407, 408, 426.

² R. v. Senior, 1 Mood. C. C. 346; 3 Inst. 50; 1 Hawk. P. C., c. 81, s. 16; 4 Bl. Com. 198; 1 East, P. C., c. 5, s. 14, p. 228; contra, 1 Hale, 432; and Staundf. 21. But the reasons on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

³ R. v. Trilloe, 1 Car. & Mars. 650; Post, 192-194.

⁴ R. v. Sellis, 1 Mood. C. C. 850; Post, 192-194.

⁵ R. v. West, 2 Car. & K. 783.

⁶ R. v. Watters, 1 Car. & Mars. 164; 2 Lew. 220.

only; but if the child were left in a remote place, where it was not likely to be found, that is, on a barren heath, and the death of the child ensued, it would be murder.¹ So, if a seaman be in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who, notwithstanding, compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast, and is drowned thereby, and his death is occasioned by such misconduct in his master; under such circumstances it is murder in the master. If there be no malice in the master, the crime is reduced to manslaughter.²

Much difficulty is likely to arise on the question whether the death took place after the child was actually born, or whilst it was in the progress of being born; and although the law be clear that a child must be actually born to be the subject of murder, it is hardly to be considered as settled what constitutes actual birth for this purpose.

Thus, where the first count of an indictment charged that the prisoner, being big with a female child, did bring forth the said child alive, and did afterwards strangle it, and other counts varied the statement of the mode of death, but all of them stated the birth of the child as above-mentioned; and it appeared that the dead body of the child was found concealed under the prisoner's bed, with a ribbon tied tightly round the neck, and the evidence of the medical witnesses left it in doubt whether the ribbon was tied round the neck, and the child strangled by it, during the progress of birth, or after the child was fully born, but before the umbilical cord was severed; and it was submitted that a child could not be the subject of murder till it had a completely independent circulation, and had been wholly detached from the mother; that the term "born alive" meant the being completely separated from the mother, and having a completely independent circulation; and a child would not have an independent circulation for some time after it was completely brought forth, unless the umbilical cord was divided. Parke, B., said, "It has been frequently so said in cases where the death has been caused by suffocation, or other injuries, which might have occurred in the course of unassisted delivery, but I should like to know whether there is any case where it has been so held where a wilful wound has been inflicted during the birth of a child. At all events, this indictment will not be supported, unless it be shown that the child was completely born, as it is distinctly averred that the child was brought forth before it was strangled." And in summing up, the very learned baron said, "Whether there might be any question on a count differently framed, it is not necessary to say; perhaps there might not; but in order to convict on the first count you must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. If you think that the child was not killed after it came forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally, while it was connected by the umbilical cord to the mother, and after it was wholly

¹ Ibid.

² U. S. v. Freeman, 4 Mason's C. C. R. 505.

produced, in that case I should put the matter into a course of further inquiry, directing you to convict the prisoner, and reserving the point for a higher tribunal; my present impression being, that it would be murder, if those were the facts of the case."¹ Shortly afterwards, upon this case being cited, the prisoner's counsel admitted, that it did not go to the length of deciding that the child must have a separate independent existence from that of the mother, in order to make the killing of it murder; Vaughan, J., said, "I should have been very much surprised if it had, because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder."²

Where, upon an indictment containing a count for murder by stabbing, and a count charging that before the child was completely born the prisoner stabbed it with a fork, and that it was born, and then died of the stab, it was proved that a puncture was found on the child's skull, but when that injury was inflicted did not appear, and some questions were asked as to whether the child had breathed. Parke, J., said, "the child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder; there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."³

Where, on an indictment alleging that the prisoner was delivered of a child, and that she afterwards strangled it, it appeared that the child which was found concealed, had breathed, but the medical men could not say when it had breathed, whether during the birth or afterwards; Littledale, J., told the jury "the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of the birth."⁴

In a case which has already been noticed, the prisoner was indicted for the murder of her child by cutting off its head, and a surgeon stated that he was enabled to say decidedly that the child had breathed, but he could not swear that the whole body of the child was born when the act of breathing took place. Coltman, J., said, "in order to justify a conviction for murder, you must be satisfied that the entire child was actually born into the world in a living state. The fact of its having breathed is not a decisive proof that it was born alive; it may have breathed, and yet died before birth."⁵ It is clear, however, if a child be actually wholly produced alive, it is not necessary that it should have breathed to make it the subject of murder. Upon an indictment for the murder of a child, where it appeared that the dead body of the child was found in a river, and it was proved by two surgeons that it had never breathed; Park, J. A. J., said, "A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed,

¹ R. v. Crutchley, 7 C. & P. 814.

² R. v. Reeves, 9 C. & P. 25.

³ R. v. Enock, 5 C. & P. 539; R. v. Wright, 9 C. & P. 754.

⁴ R. v. Poulton, 5 C. & P. 329.

⁵ R. v. Sellis, 7 C. & P. 850.

as many children are born alive, and yet do not breathe for some time after their birth.”¹

In 1848, a case arose in which it was evident that the intent was to produce an abortion, and the result of the attempt was, that the child was produced into the world at such a stage of gestation that it could not live, and died six hours after birth. This was held to be murder. It was proved by Sarah Henson, the mother, on whom the operation had been performed, that she, a single woman, being with child, went to the house of the prisoner, and having informed her of her pregnancy, underwent an operation of the nature described in the indictment. This operation was repeated on several days, and she was shortly afterwards delivered of a male child; she being then six months advanced in her pregnancy. The child was born alive, but died about five hours afterwards. A medical witness stated that there were no unusual appearances on the body of the child,—that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence. This witness further said—“Judging from the healthy appearance of the child, I cannot suppose that the premature delivery was spontaneous. The operations described by Henson would naturally and probably produce that premature delivery. It might be produced by a fall or any sudden shock received by the mother; but in this case, I have no doubt that it was, in fact, produced by the act of the prisoner.” *Miller*, for the prisoner, said: The offence of murder is not proved. The killing of an infant in its mother’s womb is confessedly not murder; but on the authority of *Rex v. Senior*, 1 M. C. C. 346, it appears to be laid down by the text-writers as the better opinion, that if an injury be received by the child in the womb, and the child afterwards born alive, dies of that injury, it is murder or manslaughter, according to the circumstances of the case. MAULE, J.—That opinion is founded on the authority of Blackstone.² *Miller*.—There must be an assault upon the child; that circumstance appeared in the case of *Rex v. Senior*, but is wanting here. The death of the child was caused, if at all by the prisoner, by her bringing it to life. If the act of the prisoner had killed the child in the womb, it would not have been murder; can it be more so because the child was by the same act brought to life? There is a statute which expressly provides a punishment for the prisoner’s offence.³ *Mellor*, for the prosecution.—This is murder. If an injury is inflicted upon a child, which causes its death *en ventre sa mère*, it is not murder; but if the child is born alive, and dies afterwards in consequence of an injury received in the womb by the unlawful act of the prisoner, that is murder. It does not appear that the body of the child received any direct injury from the operations performed by the prisoner; but it is born at a time when it cannot maintain for any considerable length of time an existence separate from the mother; and that premature delivery is caused by the felonious act of the prisoner. The act of the prisoner,

¹ R. v. Brain, 6 C. & P. 349.

² 4 Com. c. 14, and Coke, 3 Ints. 50.

³ The Stat. 7 Will. 4, and 1 Vic. c. 85.

being done with intent to procure abortion, is made felonious by 7 Will. 4, and 1 Vict. c. 85, s. 6; and being engaged in that felonious transaction, the prisoner thereby caused the premature delivery of Sarah Henson, and the consequent death of the child. The case of *Rex v. Senior*, although a case of manslaughter only, recognises the distinction upon which this case depends. MAULE, J.—There is a case for the jury. I think, that if, by the felonious act of the prisoner, the child was put into a situation in which he could not live, it is murder. *Miller* then addressed the jury on the facts. MAULE, J., (in summing up,) said—The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder; and some doubt has been suggested by the prisoner's counsel, whether the prisoner's conduct amounts to that offence; but I am of opinion (and I direct you in point of law,) that if a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder. The evidence seems to show clearly that the death of the child was thereby occasioned by its premature birth; and if that premature delivery was brought on by the felonious act of the prisoner, then the offence is complete. His Lordship then read the evidence, and, in conclusion, said:—If the child, by the felonious act of the prisoner, was brought into the world, in a state in which it was more likely to die than it would have been if born in due time, and did die in consequence, the offence is murder; and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. If, therefore, you are satisfied, to the conclusion of any reasonable doubt, that the prisoner, by a felonious attempt to procure abortion, caused the child to be brought into the world, for which it was not then fitted, and that the child did die in consequence of its exposure to the external world, you will find her guilty; if you entertain a reasonable doubt as to the facts, you will, of course, find her not guilty.¹

The concealment of the death of bastard children, and the production of abortion, as independent offences, fall not within the province of the present work.

¹ R. v. West, 2 Car. & Kir. 786—787.

II. *Self-Murder.*

Self-murder is subject to human punishment only in respect to its accessories. So far as the latter are concerned, they are guilty of murder, whether their agency consisted in advice or in assistance. Thus, a person killing another, upon his desire or command, is guilty of murder; though in such case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, was void. And where two persons agree to die together, and one of them, at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.¹ If a man, attempting to kill another, miss his blow and kill himself,² or intending to shoot at another, mortally wound himself by the bursting of the gun,³ he is *felo de se*; his own death being the consequence of an unlawful malicious act towards another. It has also been said, that if A. strike B. to the ground, and B. draw a knife and hold it up for his own defence, and A. in haste falling upon B. to kill him, fall upon the knife and be thereby killed, A. is *felo de se*;⁴ though if a man encourages another to murder himself, and he is present abetting him while he does so, such man is guilty of murder as principal. If two encourage each other to murder themselves together, and one does so, and the other fails in the attempt upon himself, he is a principal in the murder of the other.⁵ Thus, in a case which came before the supreme court of Massachusetts, the court said, "The government is not bound to prove that Jewett" (the deceased) "would have hung himself had Bowen's" (the defendant's) "counsel never reached his ears. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument, that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without doubt he was a hardened and de-

¹ 1 Hawk, P. C., c. 27, s. 6; Keilw. 136; Moor, 754.

² 1 Hale, 412.

³ 1 Hawk, P. C., c. 27, s. 4.

⁴ 3 Inst. 54; Dalt. c. 144; though see 1 Hale, 412.

⁵ R. v. Dyson, Russ. & Ry. C. C. R. 528; R. v. Allison, 8 Car. & Payne, 418; see Wh. C. L., (3d ed.) 114, 432.

praved wretch. But it is a man's nature to revolt at the idea of self-destruction. Where a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respectful friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the attention, and ultimately procure the perpetration of the dreadful deed. And if other men would be influenced by such advice, the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale. If you are satisfied that Jewett, previously to any acquaintance or conversation with the prisoner, had determined within himself, that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner, so far as it affected himself, mere idle talk, let your verdict say so. But if you find the prisoner encouraged, and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly. It may be thought singular and unjust, that the life of a man should be forfeited merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such a one out of the reach of the law is no trivial offence. Farther, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider this atrocity of the offence in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him.¹"

Two English cases to the same effect are reported. In one of these the prisoner was indicted for the murder of a woman by drowning her. It appeared that the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him; they were in a state of extreme distress: and being unable to pay for their lodgings, they quitted them in the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster Bridge to drown themselves in the Thames; they got into a boat, and from that into another boat, the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water; but whether by actual throwing of himself in, or by accident, did not appear. He struggled to get back into the boat again, and then found that the woman was gone; he then endeavoured to save her, but could not get to her and she was drowned. In his

¹ Com. v. Bowen, 2 Wheel. C. C. 321; 3 Mass. 359.

statement before the magistrate he said that he intended to drown himself, but dissuaded the woman from following his example. The learned judge told the jury that if they believed that the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder. He also told the jury, that although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. But the learned judge thought it right to submit his direction to the consideration of the judges. After considering the case, the judges were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them, and the prisoner was recommended for a pardon.¹ So where upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, both agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down on the same bed together, wishing to die in each other's arms, and the woman died, but the prisoner, recovered; Patteson, J., told the jury that, "supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law, and so also when a husband and wife, being in extreme poverty, and great distress of mind, the husband said, "I am weary of life, and will destroy myself," upon which the wife replied, "If you do, I will too." The man bought some poison, mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and, inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced a verdict of not guilty.¹

It seems that a person cannot be tried as an accessory before the fact, for inciting another to commit suicide, if that person do commit suicide, for the 7 Geo. 3, c. 64, s. 9, only extends to such persons as were previously liable to be tried either with or after the principal, and an accessory before the fact to suicide was not triable at common law.

¹ See *R. v. Alison*, 8 C. & P. 418.

CHAPTER VII.

HOMICIDE BY NEGLIGENCE.

THE cases falling under this head will be considered under the following relations:—

- I. Officers of steam and other vessels.
- II. Persons driving or riding.
- III. Persons having charge of children or dependants.
- IV. Medical men, apothecaries, &c.
- V. Manufacturers and working men.
- VI. Prize fighters, and persons engaged in athletic sports.
- VII. Persons from mischief or from other collateral unlawful purposes doing bodily harm.

1. OFFICERS OF STEAM AND OTHER VESSELS.

The general doctrine which applies to all cases of accidents by negligence in common carriers or travellers whether by land or by sea, is that if speed be used of such a nature as to prevent escape, or to destroy the capacity of the party employing it in case of a collision, or if there be a positive neglect of that care by which a collision could be avoided, the offending party, if death ensue, is guilty of manslaughter. Thus, in an English case, where the counsel for the prosecution, in opening the case, said, that he apprehended that the rule as to traversing the river Thames was the same as that applicable to the mode of passing along any of the queen's common highways: therefore, if the speed at which, or the manner in which, the prisoners were navigating the vessel, and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from stopping in time to prevent mischief to the person in it, they would be responsible for the offence of manslaughter, if his death happened in consequence; if, on a misty night, the prisoners were proceeding at such a rate, that they could not stop in time, their so proceeding was illegal, and, as death ensued, they were responsible. Parke, B., said: "You have stated the law most correctly. There is no doubt that those who navigate the Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving, or negligent conduct."¹ And under this act of Congress, any misconduct or negligence leading to death, involves the same responsibility.²

In a recent case in the Circuit Court of the United States, the general question of the liability of the affairs of steam vessels under the act of Congress, was discussed by Judge Leavitt, (Judge McLean being absent,) under the following state of facts:

¹ R. v. Taylor, 9 C. & P. 672.

² Wh. Cr. Law, 3d edit., 417; U. S. v. Collyer, post, Appendix, 483.

The defendants, viz., Warner as captain, Wishue as first mate, Demond as second mate, and Kirby as wheelsman of the Steamboat Chesapeake, then navigating Lake Erie, he said, were jointly indicted for manslaughter, under the 12th section of the act of Congress of the 7th of July, 1837.”¹ This section is in these words: “That every captain, engineer, pilot or other persons, employed on board of any steamboat, or vessel propelled in whole or in part by steam, by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof, before any circuit court of the United States, shall be sentenced to confinement, at hard labour, for a period of not more than ten years. The indictment contained five counts, of which the following is a condensed statement: 1. Charges the defendants, in their respective capacities, with general misconduct, negligence and inattention, whereby the collision took place, the boat was sunk, and the lives of several persons destroyed. 2. Charges that it was the duty of the defendants to keep a look out, and so to steer and navigate the boat as to avoid collision, and that in their respective capacities they neglected these duties, whereby the collision took place, the boat was sunk, and the lives of Eli Cone, William N. Yerke, and David Folsom were destroyed by drowning. 3. Charges that it was the duty of the captain and mate to keep a look out, and to give orders to the wheelsman so to steer as to avoid collision, etc.: and that the captain and the mate neglected these duties, and the wheelsman neglected to steer, etc., whereby collision took place and lives were lost. 4. Contains substantially the same averments as the preceding, with the addition, that it was the duty of the defendants after the collision to make an examination of the injury; and that they neglected this duty, etc., whereby the boat sunk, and lives of certain persons were lost. 5. Charges that after the collision, the defendants neglected their duties in the following particulars: 1. In not causing an immediate examination, to ascertain the extent of the injury to the boat. 2. In neglecting to close the ash hole. 3. In neglecting to run the boat ashore, at the nearest and most convenient point without delay: whereby the boat sunk, and lives were lost. A motion for leave to the defendants to sever in their trial, and a motion to quash some of the counts of the indictment were overruled. The jurymen were then sworn to try the defendants, Warner, Wishue and Demond. The defendant Kirby, was not put on his trial, and as to him, the District Attorney subsequently entered a *nolle prosequi*. The evidence taken on the trial, as condensed by the reporter, is as follows:—In the afternoon of the 9th of June, 1847, the steamboat Chesapeake, with the defendants on board, in the several capacities before stated, left Buffalo, destined for Cleveland. Between 11 and 12 o’clock in the night of that day, being about six miles from shore, and nearly opposite the Harbour of Conneaut, the captain and first mate having retired to

¹ 5 Peters’ Laws U. S. 304.

their berths, and the defendant Demond, as the second mate, being the officer on watch, and the defendant Kirby, at the wheel, the boat came in contact with the schooner John Norter, Captain Thomas master, bound for Buffalo, striking her nearly at right angles, about midship, on her starboard side, and causing her to sink in from five to ten minutes after the collision; her crew being saved from immediate death by their transfer to the steamboat. It was very soon ascertained that a hole had been made on the larboard side of the bow of the boat, and that water was rapidly coming in. The pumps were immediately set to work, all hands ordered to bail, and attempts made to stop the leak; and the boat was put towards the shore, heading for the light at Conneaut Harbour, but the water gained so fast, that when within one and a half or two miles from shore, the fires were extinguished, and the engines ceased to work; and in an hour and a half from the stopping of the engine the boat sunk in 36 feet water. There were about sixty cabin passengers on board, who with the steerage passengers, officers and crew, made the whole number between eighty and ninety. As the boat went down, the hurricane or upper deck broke, and became detached from the boat. This deck had been made fast by ropes to the mast of the boat, and remained stationary over the place where the boat sunk. The captain had given notice to those on board, that this deck was the place of safety, and advised all to get on it. Some fifty or sixty persons took refuge on it, and were all saved; and there was room enough for twenty-five or thirty more. The persons on this deck were taken from it about day-light, by the steamboat General Harrison. The night was not dark, the sky being clear and the stars visible. There was some mist, or fog near the surface of the lake; the wind was off shore, and nearly from the point S. S. W. There was but one yawl attached to the boat, which was sent ashore with thirteen or fourteen persons in her, who were all saved. Some of the passengers and a part of the crew of the boat, prepared floats or rafts, made of doors, tables, etc., on which as the boat sunk they launched into the lake; and of those who betook themselves to these means of safety, a Mrs. Hawk, and four others, viz., Messrs. Vandoren, Yerke, and Folsom lost their lives. The counsel for defence, after the District Attorney had closed his opening argument, declined addressing the jury, and moved the court to instruct them to the following effect. 1. As all crime consists in intention, the defendants are not guilty, unless they knowingly and wilfully neglected their duty. 2. As the law does not require infallibility, the defendants are not responsible for errors in judgment in the performance of their duties. 3. That greater strictness in proof is required in criminal than in civil cases, and the defendants, in order to be holden liable, must be brought within the statute in every particular. 4. That if the loss of life was not the necessary consequence of the sinking of a boat, but resulted from imprudence in leaving the wreck contrary to the captain's advice, he cannot be convicted. 5. That if the collision was occasioned by want of proper lights on the schooner, the defendants ought not to be convicted. Judge Leavitt charged the jury substantially as follows. Before I call the attention of the jury to the testimony as it applies to the allegations of the indictment, it becomes my duty to notice the propositions submitted by the counsel

for defence, on which the instruction of the court is requested. The section of the act of Congress, on which this indictment is framed, declares that officers and others, employed on any steamboat, by whose "misconduct, negligence, or inattention, the life or lives of any person or persons on board" shall be destroyed, shall be deemed guilty of manslaughter. It is believed, this is the first prosecution which has been instituted under this law, and that no construction has been given to it, in reference to the point now presented, by any courts in the Union. It is a rule of universal application in the construction of statutes, that the courts must be governed by the words used to express the intention of the legislature, when they are free from all uncertainty or ambiguity. And this rule leads the mind to the conclusion, that it was the design of the law-making power, in the adoption of the section under consideration, to create an offence, and annex a punishment to it, on principles variant from those which apply to crimes at common law, or to those generally created by statutory enactments. At common law, and usually in statutory crimes, the intention with which the act is done, charged as a criminal, constitutes the element of the crime. But in the section now brought to the notice of the court, the legislature seem studiously to have avoided the use of any terms, or words, making the intention of the party an ingredient of the offence. It is declared, in words so plain as to admit of no doubt, that any act of "misconduct, negligence or inattention," on the part of any one concerned in steamboat navigation, producing as a result, the loss of life, shall incur the guilt and penalty of the crime of manslaughter. If it had been intended that these consequences should follow in cases only where there was evidence of a positive, malicious intent, the words used would have been doubtless such as to have made that intention clear. And in that case, the offence fined and punished by the statute would have been the same as manslaughter, as recognised at common law, and the statutes of all the States in the Union. But, it is most obvious, from the language of this section, that Congress intended to go beyond this, and to provide punishment for acts to which the common law did not affix guilt or inflict a penalty. I am therefore led to the conclusion, that it will be the duty of the jury, if satisfied the material allegations of the indictment are sustained by the evidence, to return a verdict of guilty. There can be no doubt, that it was the intention of Congress to create an offence by this statute, the essence of which consists in "misconduct, negligence or inattention," in such degree, and of such character, as to have resulted in the loss of human life. This is a subject matter, clearly within the jurisdiction of Congress; and having provided, that certain acts of delinquency, attended with a certain result, shall subject the party to a penalty, irrespective of motive or intention, there is no reason why the law in a proper case should not be enforced. If it were true, as insisted by the counsel for the defence, that this view of the law gives to it a character of harshness and severity, which must render it obvious to the community, and a reproach to a humane government; it would afford no reason why courts and juries should refuse to carry it into effect. Until repealed by the power which enacted it, it must have the force of law. But the statute under consideration is not liable to this objection. It is true that it declares certain facts being

established, the parties implicated shall be deemed guilty of manslaughter; but it invests in the court an ample discretion in regard to the punishment to be inflicted, which, properly exercised, will effectually guard against undue severity. The penalty consequent on a conviction may be imprisonment for ten years; but if the circumstances are such as to call on the court for lenity, the punishment may be merely nominal—not extending beyond a few hours or few days' imprisonment. And it may be here remarked, that this great latitude of discretion, vested in the courts by the statute, by which it becomes their duty to graduate the punishment according to the facts of the case, even to the extent of making it merely nominal, is conclusive to prove, that Congress in this enactment did not contemplate the commission of the crime of manslaughter in its heinousness and guilt, as defined by the common law. If such had been the view of that body, it would not have been left in the discretion of the court, in the case of conviction to assess a merely nominal punishment. For according to the common law sense of the crime of manslaughter, it is impossible to conceive of any case in which the exercise of such discretion would be either justifiable or necessary to the extent contemplated by the statute. It may not be improper here to remark, that the title of the act of Congress, and the circumstance leading to its passage, are significant of the purposes of its enactment, and throw light upon its construction. It is entitled, "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." It is a matter of public notoriety, and constitutes a part of the history of the times, that within a short period anterior to the date of this statute, numerous steamboat disasters had occurred in our country, attended with a melancholy loss of human life, under circumstances justifying the conclusion that there was gross negligence, yet without the possibility of proving, either positively or inferentially, a malicious intent. Such was the fearful magnitude of the evil, that public feeling demanded such national legislation on the subject as would be effective in preventing the recurrence of those calamities. The stern legislative provision under consideration was the result of this state of things. Its design was to enforce the greatest possible vigilance and caution, on the part of those concerned in steamboat navigation. The utility of the law has been satisfactorily tested by its salutary results. It has greatly elevated the business of steamboat navigation, by introducing in all its departments men of higher moral characters, and superior practical qualifications for their duties. As a consequence the instances of reckless disregard of human life, and accidents resulting from improper hazards, are much less frequent, while the public confidence in the safety of steamboat travelling is greatly increased. It will be for the jury to say whether the result charged in the indictment, namely, the deaths of the individuals named, is justly imputable to the "misconduct, negligence, or inattention," of the defendants or any of them. If the collision happened from the improper and unskilful navigation of the schooner, or any other cause, rendering it an unavoidable occurrence, the defendants are entitled to a verdict of acquittal, in so far as they are charged with misconduct or omission of duty in connexion with the collision. There are some

other points presented in the instructions asked for, which will be noticed by the court in the consideration of the evidence, as applicable to the indictment. To this evidence I propose very briefly to direct the attention of the jury. It will be proper to remark here, that the case presents itself in two aspects; first, in reference to the allegations of misconduct and negligence, producing the collision, and second, in reference to the allegations of misconduct and negligence, in not taking prompt measures for the safety of the passengers after the collision. The second and fifth counts are those principally relied on by the prosecution; and the views which I propose to present will be confined to these. The second count charges substantially, that the defendants, in their several capacities, were guilty of misconduct and neglect, in not keeping a proper look out, and in not using the proper efforts to steer and navigate the boat, whereby she came in collision with the schooner John Norter, and the lives of the persons named were destroyed by drowning. As the testimony clearly shows, the captain and first mate were not on duty for some time before, and when the collision took place, they cannot be held answerable for it; and under the second count, the inquiries of the jury will be confined to the conduct of the second mate, who was then the officer on deck? Did the second mate, Demond, fail in his duty, in not keeping a proper look out as the officer on deck? Captains Kelsey, Shook, Perkins and Stannard, experienced and skilful navigators on the lakes, have been sworn as experts in this case. They concur in stating that the officer on deck is for the time being the sailing master, and charged with the general supervision of the boat; that it is his duty to be on the look out for lights, obstructions, etc.; to give orders when necessary to the wheelsman and to the engineer; and that in general his proper place is on the deck, though it is his duty to be in other parts of the boat where his presence may be required: and these witnesses also state, that it is proper and usual for the mate, when leaving the deck, except it be for a very short period, to give notice to the wheelsman of his intention, and request him to keep a look out during his absence. It is also stated by all the experts except one, that it is the duty of the wheelsman, not only to steer, but to keep a look out for lights, etc., and that his position for this purpose is the most favourable one on the boat. The witness Kirby, who was at the wheel when the collision took place, says the defendant, Demond, was on deck very shortly before it happened, and had just left the wheel-house as the boat struck the schooner. He saw Demond run to the bell and ring, to stop the engine, and immediately after the collision took place. There is no evidence that Demond gave any orders to the wheelsman; nor does it appear he saw the schooner till at the very moment of collision. The witness Seymour states, that he was at the wheel-house for some time before the collision happened; that Demond was on the deck walking back and forth, and, part of the time, sitting with witness in conversation with him. Witness retired to his berth, and had hardly got to his room till he heard two bells in quick succession, one to stop the engine and one to back off. He also says that while on deck he saw no lights but those of the light house at Conneaut, and of the Steamboat Constellation. This is all the material testimony as to this point; and from this the

jury will decide whether Demond was guilty of negligence or omission in not having discovered the schooner in time to avoid collision. The jury will also inquire, under the second count, whether Demond, as sailing master of the boat, failed in duty, in not giving proper orders to the wheelsman, as to the course and direction of the boat. And in this inquiry it will be proper for the jury to bear in mind that if the wheelsman was steering the boat correctly, no order was required from the sailing master, and he cannot therefore be in fault for not giving an order. It seems from the testimony of all the experts that the steamboat at the time she struck the schooner was in the track usually followed by boats going up the lake, which at that place is about six miles off shore. Kirby, the wheelsman, says he saw the schooner's light flash up for a moment: saw the light over the left bow of the boat, about one mile distant, witness steering at the time W. S. W. He then put the boat one point further out into the lake; in a few minutes saw the schooner very near; put the helm hard, hard a port, and immediately the boat struck the schooner. Witness says after he saw the light of the schooner, it disappeared, and he saw it no more—supposed it was hid by the sails. Captain Thomas, the master of the schooner, states that he first saw the steamer's light—6 or 7 miles ahead, he steering at that time N. E. by E. S. He then put his vessel one point further out into the lake, and kept her steadily on that course. This witness says it is the usage for sailing vessels descending the lake at that point, to keep in shore from the steamboat track; but he thought he was rather too near the land, and therefore gave the order to put the steamboat further out. He also testifies that there was a light at the end of the jib of the schooner, and also that just before the collision, he took the light out of the binnacle, held it up and hailed the steamboat. Although several witnesses state there was no light on the schooner at the time the collision happened, the weight of the evidence proves there was a light. In coming to a conclusion as to who was in fault in this collision, it will be important for the jury to attend specially to the testimony concerning the relative position and course of the schooner and steamboat just before and at the time they came together. For, if, as before stated, the accident occurred through the improper navigation, and wrong course of the schooner, the sailing master of the steamer cannot be held accountable. The captains already named, testifying as experts, agree in the opinion, that the schooner steering N. E. by E. and the steamer W. S. W. being 6 miles apart, the schooner must have been considerably in shore from the line of the steamer's course, and that it was the duty of the schooner to have kept inside of that line hugging the shore. And these witnesses say, if she had pursued that course a collision would have been impossible, without a change of the steamer's direction. Kirby says he first saw the schooner's light over the left bow of the steamer; and if so, the schooner was then in shore from the line of the steamer's direction. It is proved by the experts, to be the general usage in the navigation of the lakes, that when a sailing vessel and a steamboat are approaching in opposite directions, it is the duty of the former to pursue her course steadily; and, if necessary, the steamboat is expected to diverge from her previous direction.

Captain Shook, and perhaps some of the other professional navigators, say, Kirby the wheelsman of the Chesapeake was right, under the circumstances, in first putting the boat one point out into the lake, and when very near the schooner putting the helm hard-a-port, the effect of which was to give her a still more northerly direction. If the jury, upon full consideration of the evidence, shall come to the conclusion that the schooner, through mistake, or unskilfulness of her sailing master, was proceeding across the line of the steamer's proper course, and that, therefore, the collision was unavoidable, the defendant, Demond, cannot be held responsible for the consequences. Upon this supposition, there is no ground for the conclusion, that the accident was the result of neglect or inattention on his part. If, however, the jury are satisfied the collision is attributable to his delinquency in duty, in not keeping a vigilant lookout, and in not properly navigating the boat, as charged in the second count, it will then be their duty to inquire further, whether, as the result of the collision, the lives of the individuals named in the indictment were lost by drowning. There is no room to doubt, from the evidence, that the lives of those persons were destroyed by drowning. But, it is insisted, and the court is requested so to instruct the jury, that if the loss of their lives was not the necessary result of the collision, the allegation in the indictment, as to the means by which they came to their deaths, is not sustained; and, consequently, that there cannot be a verdict of guilty on this count, or, indeed any of the counts in the indictment. The evidence is not satisfactory to prove, that any lives were lost except those of persons who left the boat, on floats and rafts. And it is proved, beyond all doubt, that the captain and probably some other officers of the Chesapeake, notified the passengers that they would be safe by getting on the hurricane deck; and it is also clearly proved, that all who sought this place of safety were preserved. Whether the persons who unfortunately resorted to other means to save themselves, were apprized of the security afforded by the hurricane deck, is not known. If, being made acquainted with the fact, or if, by reasonable vigilance, they could have acquired this information, the persons whose lives were destroyed, under the influence of excessive alarm, unnecessarily and indiscreetly left the boat, preferring to run the hazard of launching into the lake, on floats or rafts, and as a consequence were drowned; the destruction of their lives is not so connected with, and a necessary result of the steamboat disaster, as to make the defendants answerable for their loss. On the other hand, if these persons under the pressure of the circumstances in which they were placed, conducted with ordinary prudence and discretion, then the allegation in the indictment, as to the means by which they came to their death, is sustained. The Court will now call the attention of the jury to the fifth and last count of the indictment. This count charges the defendant with a failure in duty, after the collision, in the following particulars:—1. In not causing an immediate examination to ascertain the nature and extent of the injury to the boat. 2. In neglecting to close the ash-holes. 3. In neglecting to run the boat ashore at the nearest and most convenient point without delay. I will not detain the jury by a re-statement of the evidence of each witness on these points; but will present a summary of the material

facts proved, in relation to each of them. First, as to the allegation of improper delay in the examination of the injury to the boat. The degree of promptitude required of the officers of the boat, in making this examination, must depend in some degree on the character of the shock produced by the collision. If it was severe and of a nature which should have produced the apprehension in the mind of an experienced and skilful navigator that the boat was seriously injured, the officers should be held to greater promptitude and vigilance in the examination of the injury, than under the opposite state of facts. It appears that to some of the witnesses, the shock from the collision seemed light, and produced no apprehension of serious injury to the boat; while others thought it severe, and such as necessarily to jeopard the safety of the persons on board. The defendant, Captain Warner, had retired to his room for the night, but was roused by the shock of the collision; and some of the witnesses say, they saw him very soon after the collision, leaving his room without coat, hat or boots, and going to the forward part of the boat. These witnesses state that no more time elapsed between the shock of the collision and the appearance of Captain Warner on deck, than such as was necessary to enable him partially to dress himself. The witness, Lytle, states, that he had not gone to his berth when the collision took place, but was near the saloon below the promenade deck. He was alarmed by hearing the engineer's bell ring in a very quick and hurried manner: and immediately the collision occurred; the schooner and the boat stuck together for a very short time, when the boat backed off, and they separated. This witness immediately lowered a light over the bow of the boat, and discovered a hole, in the left side of the bow, through which the water was coming in. He went at once on deck, where he met the captain, and reported to him the result of his examination. The captain then ordered the second mate to make a thorough examination, and very soon the order was given to put the boat ashore. The witnesses Hubbard, Kimball and Dwight, agree in stating there was an examination; but cannot state the precise time which elapsed from the collision till the examination was made. The last named witness says, he did know the captain could have done more than he did do. The witness Hawk, thinks about 12 minutes passed from the time of the collision till it was discovered the boat was leaking. As to the averment of neglect, in not stopping the ash hole, the jury will have no difficulty in the conclusion that it is not sustained. This hole, it would seem, opens on the outside of the boat about six inches below the timbers of the main deck. Captain Shook and others testify, that when the boat had so far sunk as to take in water at this hole, it would be impossible to prevent her from going down, and that the only effect of closing it, would be to retard the sinking for a short time. I now call the attention of the jury to the third specification of the fifth count, namely, neglect in not running the boat ashore at the nearest and most convenient point without delay. It was clearly the duty of the captain, as the best mode of securing the lives of the passengers, as soon as it was ascertained there was danger the boat would go down, to run her ashore, with as little delay as circumstances would allow. In the adoption of this course, the law will hold himself to reasonable promptitude.

And if, from indecision or gross negligence of duty, he omitted to give the proper order in time, and as a consequence, the lives of the passengers were lost, he is responsible for that result. It is therefore an important inquiry, whether there was unreasonable delay in giving the order to run ashore. There is some variation in the statement of the witnesses, as to the time that elapsed between the collision and the giving of this order. Hawk says this time was between twenty-five and thirty minutes; Kimball thinks that about twenty minutes after the boat struck, he heard the captain say, he was about to run the boat ashore; Dwight says that in about fifteen minutes after the collision, the boat was under headway for land; Hubbard thinks from twenty to thirty minutes elapsed; Stern states the time at from ten to fifteen minutes; Mrs. Bradbury thinks it was twenty minutes; Church says he was on deck within fifteen minutes after the boat struck, and she was headed for shore; Mr. McIlvane says it was twenty minutes after the collision before he heard there was a leak; Seymour gives it as his opinion, that the time did not exceed eight or nine minutes; and Lytle says the schooner sunk in ten minutes after the collision, and that the boat started for shore immediately after. Captain Thomas says the schooner went down in ten minutes, and he supposes the boat started for shore as soon as it could be done. It is in evidence, that after the discovery of the leak, an attempt was made to stop it, by forcing mattresses and bed clothing into the hole, from the inside of the boat, and also to check the in-flow of water by passing a sail over the bow: but both attempts were unsuccessful. It also appears, that strenuous efforts were made to keep the boat afloat, by putting the pumps to work, and by bailing, but without avail. And it is also proved, that after the order was given to head the boat for shore, every possible effort was made to increase her speed, by making all the steam that could be made, and that the fireman and engineers remained at their posts, doing their duty, till the fires were put out by the water and the engines stopped. There seems no doubt, from the opinion of the experts, that the captain was right in directing the boat for the pier at Conneaut, although it was not the nearest point of land in a direct line from the boat. The experts also concur in the opinion, that the defendant, Warner, was in the strict line of his duty, as a humane seaman, in providing for the safety of the crew of the sinking schooner, by transferring them to his boat. And so far as any delay occurred from his attention to this duty, he is not liable to censure. Upon the whole, the jury will judge, taking all the circumstances into view, whether Captain Warner conducted with reasonable promptitude in giving the order to run the boat ashore. Without any further comments on the evidence, the case is now committed to the jury. If satisfied from the proof, the defendants are guilty of "negligence, misconduct or inattention," and that human life has been lost thereby, it will be the duty of the jury to return a verdict of guilty. And here it may be proper to remark, it is not claimed nor does the evidence afford the slightest ground for such assumption, that the defendants, or any of them, were actuated by any malicious purpose, as connected with this unfortunate disaster. And in some respects it is clearly proved, they were active and prompt in attending to their duties after the collision took place, and that their conduct

was highly meritorious. It is also proper that I should remark, that the defendants are entitled to the full benefit of the evidence which they have adduced, proving their general good professional characters. And in reference to allegations of negligence or misconduct, concerning which, the jury may be in doubt as to weight of testimony, the fair professional reputation of the defendants, may properly have such weight as to turn the scale in their favour.—The defendants were acquitted.¹

The same principles, so far as their common law bearing is concerned, have been determined in England. Thus upon an indictment against the captain of a steamer for manslaughter in causing a death by running down a boat, the counsel for the prosecution, in opening the case, said, if a party engaged in a lawful occupation is guilty of wilful misconduct, or of gross negligence, it is manslaughter. Park, J. A. J., said; "You must show some act done; you rather state it as if a mere omission on the part of the prisoner in not doing the whole of his duty would be enough; and we are of opinion that is not sufficient. I have no hesitation in saying, that if there was sufficient light, and the captain himself was at the helm, or in a situation to be giving the command, and did that which caused the accident, he would be guilty of manslaughter." Alderson, B., "There must be some personal act. In the case of a coach, the coachman is driving animals, and in the case of the captain, he is governing reasonable beings." It appeared in evidence that the deceased and two other persons were in a small boat going down the river, when a small steamer used for towing, of which the prisoner was master, met them, and, notwithstanding their shouting, struck the boat, and nearly cut it in two, in consequence of which the deceased was drowned; the waterman proved that he and the captain were on the starboard side of the windlass, and two other men were on the larboard side; that the captain did not leave his place once, and the mate was at the helm, and remained there till after the accident; that the engine was all open, and worked on deck, and made a great noise; that he did not hear the shouting in time to do anything to avert the accident. Park, J. A. J., "This case has come to its end; at the outside it can only be considered as one of those accidents which will happen in a river navigation; it appears that they kept a proper look out; and there were several persons on deck at the time."²

So also when the captain and pilot of a steamer were indicted for manslaughter in causing a death by running down a smack, and it appeared that at the time the steamer started there was a man forward in the forecabin to keep a look-out, but at the time when the accident happened, which was about an hour afterwards, the captain and pilot were both on the bridge which communicates between the paddle-boxes; the night was dark, and it was raining hard; the steamer had a light at each end of the topsail yard; an oyster smack, on board which the deceased was, was coming up the Thames without any light on board; the deceased was below: a boy who was on board the smack stated that when the steamer struck the smack he got on board the steamer, and found nobody forward: other witnesses were present

¹ U. S. v. Warner, 4 M'Lean, 464, &c.

² R. v. Green, 9 C. & P. 156.

to show that no person was forward on the look-out at the time. Park, J. A. J., "Then the captain is not responsible in felony; it is the fault of the person who ought to be there, and who may have disobeyed orders; if the captain leaves the pilot on the paddle-box, as he did here, he is not criminally responsible. In a criminal case every man is answerable for his own acts; there must be some personal act; these persons may be civilly responsible." Alderson, B., "If you could show that there was a man at the bow, and that the captain had said 'Come away, it's no matter about looking out,' that would be an act of misconduct on his part. If you can show that the death of the deceased was the result of any act of personal misconduct on the part of the captain, you may convict him." Park, J. A. J., "Supposing he had put a man there, and had gone to lie down, and the man walked away, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make any thing of it." Alderson, B., "I think this case has arrived at its termination: there is no act of personal misconduct or personal negligence on the part of these persons at the bar."¹

II. PERSONS DRIVING OR RIDING.

Independently of the principles just announced, which bear with equal force upon land as upon water collisions, it must be remembered that there are cases in which the driving of an unsafe horse, like the navigating of an unsafe ship, makes the offending party guilty of manslaughter if death ensue. Thus if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appears clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter,² though it is said, that in such a case it would be murder, if the rider intended to divert himself with the fright of the crowd.³

Certain particular requisites, however, must be adhered to in driving, which it is well to keep in mind.

First, as to speed. Any degree of rapidity inconsistent with the degree of check with which the horses may be held, will make the owner responsible, and it even seems that mere negligence on part of the deceased, who if careful might have avoided the accident, will be no defence. Thus on an indictment for manslaughter, it appeared that the deceased was walking along a road, in a state of intoxication: the prisoner was driving a cart drawn by two horses, without reins; the horses were cantering, and the prisoner was sitting in front of the cart; on seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and one of the cart-wheels passed over him, and he was killed: it was held, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if, from the rapidity of the driving, or from any other cause, the person cannot get out of the way time enough, but is killed, the driver is in law guilty of manslaughter;

¹ R. v. Allen, 7 C. & P. 153.

² 1 Hawk. P. C. c. 31, s. 68.

³ 1 East, P. C. 231.

and that it is the duty of every man, who drives any carriage, to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur.¹

Racing, if it results in such speed as makes the driver unable to keep his horses in good check, produces a like liability. Thus upon an indictment for manslaughter, it appeared that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and the witnesses for the prosecution stated that the prisoner was whipping his horses just before his omnibus upset. The defence was, that the horses in the omnibus driven by the prisoner took fright and ran away. Patteson, J., said, "The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable: for a man is not to say, I will race along a road, and when I am got beyond another cartage I will pull up. If the prisoner did really race, and only when he had got past the other omnibus endeavoured to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace, that he could not control them? if you are of that opinion you ought to convict him."²

And so if two persons be driving a cart at a dangerous and furious rate, and they be inciting each other to drive at such rate along a turnpike road, and one of the carts run over a man and kill him, each of the two persons is guilty of manslaughter; and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time.³ Thus, where the prisoners were indicted for the manslaughter of one James Duroseo, the second count of the indictment charged them with inciting each other to drive their carts and horses at a furious and dangerous rate along a public road, and with driving their carts and horses over the deceased at such furious and dangerous rate, and thereby killing him. The third count charged Swindall with driving his cart over the deceased, and Osborne with being present, aiding and assisting. The fourth count charged Osborne with driving his cart over the deceased, and Swindall with being present, aiding and assisting. Upon the evidence, it appeared that the prisoners were each driving a horse and cart, on the evening of the 12th of August, 1845. The first time they were seen that evening was at Draycott toll-gate, two miles and a half from the place where the deceased was run over. Swindall there paid the toll, not only for

¹ R. v. Walker, 1 C. & P. 320.

² R. v. Timmings, 7 C. & P. 499.

³ R. v. Swindall, 2 Car. & Kir. 229.

that night, but also for having passed with Osborne through the same gate a day or two before. They then appeared to be intoxicated. The next place at which they were seen was Tean Bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving; this was 990 yards from the place where the deceased was killed. The next place where they were seen was forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike gate a quarter of a mile from the place where the deceased was killed, Swindall, who appeared all along to have been driving the first cart, told the toll-gate keeper, "We have driven over an old man;" and desired him to bring a light and look at the name on the cart; on which Osborne pushed on his cart, and told Swindall to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which Swindall said he had sold his concern to Osborne. It appeared that the carts were loaded with pots from the potteries. The surgeon proved that the deceased had a mark upon his body which would correspond with the wheel of a cart, and also several other bruises, and, although he could not say that both carts had passed over his body, it was possible that both might have done so. *Greaves*, in opening the case to the jury, had submitted that it was perfectly immaterial in point of law, whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road; that that was an unlawful act, and, as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. It was clear that they were either partners, master and servant, or at all events companions. If they had been in the same cart, one holding the reins, the other the whip, it could not be doubted that they would be both liable for the consequences; and in effect the case was the same, for each was driving his own horse at a furious pace, and encouraging the other to do the like. At the close of the evidence for the prosecution, *Allen*, Serjt., for the prisoner, submitted, that the evidence only proved that one of the prisoners had run over the deceased, and that the other was entitled to be acquitted. *POLLOCK*, C. B.—I think that is not so. I think that *Mr. Greaves* is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last he is equally liable; the person who runs over the man would be a principal in the first degree, and the other a principal in the second degree. *Allen*, Serjt.—The prosecutor, at all events, is bound to elect upon which count he will proceed. *POLLOCK*, C. B.—That is not so. I very well recollect that in *Regina v. Goode*, there were many modes of death specified, and that it was also alleged that the deceased was killed by certain means to the jurors unknown. When there is no evidence applicable to a particular count, that count must be abandoned; but if there is evidence to support a count, it must be submitted to the jury. In this case the evidence goes to support all the counts. *Allen*, Serjt., addressed the jury for the prisoners. *POLLOCK*, C. B., (in summing up.)—The prisoners are charged with contributing to the death of

the deceased by their negligence and improper conduct, and if they did so, it matters not whether he was deaf, drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one ship-owner may recover against another for any damage done, he must be free from blame; he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But, in the case of loss of life, the law takes a totally different view—the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person. Generally, it may be laid down, that, where one by his negligence has contributed to the death of another, he is responsible; therefore you are to say, by your verdict, whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners. A distinction has been taken between the prisoners; it is said that the one who went first is responsible, but that the second is not. If it is necessary that both should have run over the deceased, the case is not without evidence that both did so. But it appears to me that the law, as stated by Mr. *Greaves*, is perfectly correct. Where two coaches, totally independent of each other, are proceeding in the ordinary way along a road, one after the other, and the driver of the first is guilty of negligence, the driver of the second, who had not the same means of pulling up, may not be responsible. But when two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt.¹

Driving at the rate of fifteen miles an hour, or a mile in four minutes, on a public highway is unlawful; and if death ensues from a collision thus produced without fault of the injured party, the offence, it seems, would be murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.²

Caution.—There must always be certain caution exercised by the driver commensurate to the liability to danger. Thus, a person driving a carriage is not bound to keep on the ordinary side of the road; but if he do not do so, he is bound to use more care and diligence, and keep a better look out, that he may avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.³

So it appears that if the driver might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection.⁴ A. was driving a cart with four horses in the highway at Whitechapel, and he being in the cart, and the horses upon a trot,

¹ 2 Car. & Kir. 229—232.

³ Pluckwell v. Wilson, 5 C. & P. 375.

² Kennedy v. Way, Brightly R. 186.

⁴ Post. 263.

they threw down a woman, who was going the same way, with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder, Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter.¹ But upon this case Mr. East remarked, "It must be taken for granted from this note of the case, that the accident happened in a highway, *where people did not usually pass*; for otherwise the circumstance of the driver's being in the cart, and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person who could not get out of the way in time. And, indeed, such conduct, in a driver of such heavy carriages, might, under most circumstances, be thought to betoken a want of due care, if any, though but few, persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required: but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it, which persons in similar situations are accustomed to do."²

A carter, who is supposed not to have the means of controlling his horse when standing in the cart, is bound to keep at his horse's head or side, and if in consequence of his neglect in this respect, death follows, he is guilty of manslaughter. Upon an indictment for manslaughter, the evidence was, that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there, the cart went over a child, who was gathering up flowers on the road. Bayley, B., held, that the prisoner, by being in the cart, instead of at the horse's head, or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter.³

A foot-passenger in England is not excluded from the use of the carriage way, though there be a foot-path, and hence the killing of him by a carriage is manslaughter in the owner, if reasonable care was not used. Thus a tradesman was walking on a road, about two feet from the foot-path, after dark; but there were lamps at certain distances along the line of road, when the prisoner drove in a cart drawn by one horse, at the rate of from eight to ten miles an hour, according to some witnesses, and from six to seven miles an hour, according to other witnesses; the prisoner sat on some sacks, laid on the bottom of the cart, and he was near-sighted. Other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. Bolland, B., told the jury that the question was, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty; but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter.⁴

¹ 1 East, P. C. 263.

² 1 East, P. C. 263.

³ Knight's case, 1 Lew. 168. See also Repsher v. Wattson, 5 Harris, 365.

⁴ R. v. Groat, 6 C. & P. 627.

The same general views apply to accidents caused by persons riding on horseback in a furious and improper manner. If, however, *two* are so riding in a furious and improper manner, and the *second* strikes a third party, which results in the latter's death, it is the *second* rider alone that is responsible. A. and B. were riding on horseback, at a very rapid pace along a highway; the deceased, who was also on horseback, drew off his horse as far from the middle of the road as the place would allow: A. passed by him without any accident; but B.'s horse and the horse of the deceased came in collision, and both the deceased and B. were thrown, and the deceased killed. Patteson, J., said, "I think that if two are riding fast, and one of them goes by without doing any injury to any one, he is not answerable, because the other, riding equally fast, rides against some one, and kills him. A., therefore, must be acquitted. If you think that B. was riding in an improper and furious way, and rode against the deceased, he is guilty of manslaughter, but if you think that the deceased's horse was unruly, and got into the way, you ought to acquit."¹

And as has just been noticed, if a man breaking an unruly or vicious horse, ride him amongst a crowd, and the horse kick a man and kill him; this is murder if the rider brought the horse into the crowd with an intent to do mischief, or even to divert himself by frightening the crowd;² manslaughter, if done heedlessly and incautiously only.³

III. PERSONS HAVING CHARGE OF CHILDREN OR OF DEPENDANTS.

When a child dies after its birth, from wilful neglect during parturition, or before that period, it is murder, or manslaughter, according to the exact intention. No case has yet been reported on this precise point, but that such would be the case may readily be inferred from a case on another point where Erskine, J., directed the jury, that if they were satisfied the child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully strangled the child after it had been so produced and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, he was of opinion that the charge in the counts was made out, although the child at the time it was so strangled, still remained attached to the mother by the navel string. The jury found the prisoner guilty; and, upon a case reserved, the judges held the conviction right.⁴

To justify a conviction for homicide by neglect, the cause of death must have been *corporal*, not nervous or sentimental; and therefore where a person, either by working upon the fancy of another, or by harsh or unkind usage, puts him into such a passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice.⁵ But when an act is done or committed, the probable consequence of which may be, and eventually is death, such killing may be murder; although no stroke be struck by the defendant and no killing may have been primarily

¹ R. v. Martin, 6 C. & P. 396.

² 1 Hawk. c. 31, s. 68.

³ 1 East, P. C. 231; see Hale, 231, 475; 1 Hawk. c. 29, s. 12.

⁴ R. v. Trilloe, 1 C. & Mars. 650.

⁵ 1 Hale, 427, 429; 1 East, P. C. c. 5, s. 13, p. 225; Fairlee v. People, 1 Illinois, 1.

intended;¹ as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died;² where a person otherwise helpless was exposed so as to freeze to death;³ where a woman being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite;⁴ where a child was placed in a hogstye, where it was devoured,⁵ and where an infant child was shifted by parish officers from parish to parish, till it died for want of care and sustenance,⁶ it was considered that the act so done, followed by death, amounted to felonious homicide. And such in this country was held to be the law where a master, knowing a seaman's debility and incapacity to hold on, forced him to go aloft, whereupon the seaman fell to the deck, and was killed, *Story, J.*, saying in his charge to the jury, "In respect to the general principles of law, applicable to cases of homicide, there has been no controversy at the bar; and I am spared the necessity of expounding them beyond what has been read from approved authorities. But the circumstances of this case call for an explicit instruction to you upon the points made in the defence. These are, 1, that the death of *Whitehead*, (the seaman, whose death is feloniously charged in the indictment,) was solely owing to accident and misadventure in the course of his duty, the fall from the yard not being occasioned by his debility, but by circumstances which might have occasioned it to a healthy seaman: 2. If his death was not owing to accident or misadventure, but simply to his debility, yet the circumstances of the case do not show, that such debility was so known to the master, that the order, that he should go aloft, was unjustifiable or wantonly wrong: 3. That if the order was not strictly justifiable, still the act was not the result of personal malice to the deceased in particular, nor of brutal and malignant passions or feelings, which establish general malice, and, therefore, in no event can the facts justify a conviction of murder: 4. That it is not a case even of manslaughter; for there was not such a want of caution, or such gross negligence in the master, as would, in the absence of malice, justify a verdict of manslaughter. The first inquiry proper for the jury then is, whether *Whitehead* came to his death by mere accident or misadventure; or whether it was occasioned by his debility and exhaustion, arising from physical infirmity at the time of his fall from the yard. If occasioned by such debility and exhaustion, the next inquiry ought to be whether that state of debility and exhaustion was fully known to Capt. *Freeman*, when he gave the orders for his, *Whitehead's* going aloft. If so, were the circumstances such as, that Capt. *Freeman* must, and ought to have foreseen, that the enforcement of his order to go aloft would probably be attended either by death or enormous bodily injury by falling, to *Whitehead*, so that the jury can justly infer, that it must have been persisted in from personal malice to the deceased, or from such a brutal malignity of conduct, as carries with it the plain indications of a heart regardless of social duty, and fatally bent on mischief. If so, it was murder. And it would not vary the case, that the moral force of the authority of the master to compel performance, instead of physical force, produced compliance with the order on the part of *Whitehead*, although the

¹ 4 Blac. Com. 197.

³ *Nixon v. People*, 2 Scam. 269.

⁵ 1 East, P. C. c. 5, s. 13, p. 226.

² 1 Hawk. P. C. c. 31, s. 4; 1 Hale, 431, 432.

⁴ 1 Hale, 431; 1 Hawk. P. C. c. 31, s. 6.

⁶ Palm. 545.

latter was sensible of his own extreme debility. If the jury are not satisfied, that there was either actual malice to the deceased, or constructive malice, arising from brutal malignity, as before mentioned; still, if the circumstances of the case show, that there was gross heedlessness, want of due caution, and unreasonable exercise of authority on the part of Capt. *Freeman*, and that he ought to have known, and could not but have known, that *Whitehead* was unfit to go aloft, and that there was probable and immediate danger to his life in his so doing, then notwithstanding the absence of such malice, the offence is at least manslaughter. For every act done wilfully, and with gross negligence, by any person, the known effect of which, under the circumstances, must be to endanger life, is, if death ensues, at least manslaughter.¹

And so also when the prisoner, her child having been born alive, dropped it on the side of the road without any clothing or covering to protect it from the inclemency of the weather, where it died from the cold, she having wholly concealed the birth of the child till she was apprehended; Coltman, J., in summing up, said, "if a party so conduct himself with regard to a human being, which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such that he must have been aware that the result would be death the crime would be manslaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be found by some one else, and preserved, because then it would only be the crime of manslaughter. If a person were to leave a child at the door of a gentleman, the probability would be so great that it would be found, that it would be too much to say that it was murder, if it died: if, on the other hand, a child were left in an unfrequented place, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved."²

As has already been observed, the use of authority to compel a party to do a fatal act, involves the guilt of felonious homicide. Threats, alone, where the defendant occupies a position of authority, have this effect. Thus, in a manuscript English case, it appeared that the defendant, a husband, beat his wife and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall, died. There was strong evi-

¹ U. S. v. *Freeman*, 4 Mason's R. 512, 513, 514.

² R. v. *Walters*, 1 C. & Mars. 164. See *Stockdale's case*, 2 Lewin, 220. And see *ante*, p. 93, 94.

dence that the death of the wife was occasioned by the blows she received before her fall; but Heath, J., Gibbs, J., and Bayley, J., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself.¹ And where the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, endeavoured to escape, and so doing, was fatally injured from another cause, it was held murder.²

A husband is bound to afford nurture and comfort to his wife, and if she dies from the want of it, he is guilty of manslaughter. When, however, there is a separation by mutual consent, and a separate maintenance is allowed to and accepted by her, as he is not then bound to supply her with shelter, he is not responsible for her death from exposure. In a case, tried in England, in 1844, before Gurney, B., this principle was carefully investigated. It appeared from the evidence, that the prisoner and the deceased were married, and that, for about four years previous to the death of the wife, which event took place on the 24th November, 1843, they had separated by mutual consent, the prisoner allowing her 2s. 6d. a week. This sum had been, in general, regularly paid, and the last payment was on the Sunday preceding her death, namely, the 19th November; from that day the deceased had been ailing. On Tuesday, the 21st November, she was turned out of her lodgings, being at that time suffering from diarrhoea, sickness, and extreme pain. She proceeded to a surgeon, who gave her some medicine. This she took, which somewhat relieved her; and the following day she again visited the surgeon, who gave her some more medicine, together with a note to the relieving officer of the Union. This was never delivered. About the middle of that day she was at the house of a person of the name of Weller, in a state of great illness and suffering, when the prisoner, her husband, passed by. Mrs. Weller called him in, telling him he must take his wife away, as she could not shelter there. The prisoner replied, "Turn her out; I won't be pestered with her," and then walked away. On the night of Wednesday, which was wet and dark, she was seen by a police constable, wandering about, seeking shelter at Foot's Cray. The constable took her to a house, where the prisoner, her husband, lodged. On calling him, the prisoner came to the window, when the constable told him of the state of his wife, who was ill and without lodging, and explained to him that it was incumbent on him to provide her with lodging and relief. The prisoner answered, that he had no lodging for her, that she was a nasty beast, and that he could not live with her; and immediately after, he shut the window and went away. The constable would not positively swear, that the prisoner actually saw that his wife was there with him. The deceased refusing to accompany the constable to the station-house, he left her. At 9 A. M., he subsequently found her sitting

¹ R. v. Evans, O. B. Sept. 1812; MS. Bayley, J.; 1 Russ. on Cr. 488.

² R. v. Hickman, 5 C. & P. 151; R. v. Pitts, 1 C. & Mars. 284.

down in a privy, the door of which was unbolted, which was at the back of some houses. It was raining hard and blowing a gale of wind, and she had closed the door. She appeared then ill and wet. At 7 P. M., on the following day, Thursday, the deceased came to the Black Horse public house at Sidarp, being, to all appearance, very ill. The prisoner was, at the moment, in the public-house with some friends, and when told of the state of his wife, said, "She had never been a wife to him for three years; but yet, if the landlady would afford her the accommodation of a bed, he would pay for it." She had already received a bed from the landlady, for which the deceased offered to pay her, and she went to bed. On the next morning (Friday) the deceased was found to be in a dying state. She expired before medical aid could be procured. It appeared, from the post-mortem examination which had been made, that the deceased was labouring under a complication of mortal diseases, which must have speedily resulted in death. The surgeon who opened the body gave it as his opinion, that the immediate cause of death was diarrhoea brought on by exposure to the inclemency of the weather; and that he considered the period of her existence had been abridged in consequence of her not having had shelter on Wednesday night. In his defence, the prisoner stated to the jury the causes which led him to separate from the deceased, and said, that, in a conversation which he had with Mr. Wells on the Wednesday, he offered to pay for whatever relief the parish might afford to his wife. He further added, that, when the constable called him up on the Wednesday night, his landlord would not allow him to admit the deceased, but that he then promised to procure her a lodging on the next day. GURNEY, B., (to the jury.)—The prisoner stands indicted for manslaughter. But this manslaughter wears a very different aspect from those which ordinarily come under our notice. In the great majority of cases, the manslaughter, indeed, I may say in almost all such cases, the death, is the result of some violent act done or committed. Here however, the charge is, that the prisoner, being the husband of the deceased, did wilfully neglect to provide her with proper shelter, by reason of which her death was accelerated. There are other counts charging him with neglecting to provide her with food, but no evidence has been adduced in support of them. But whether the death of the deceased was actually caused by the act of the prisoner, or was only accelerated by it, the effect is the same in point of law. If, notwithstanding the nature and extent of her complaints, she could have lived on till the next month or the next week, and her death prematurely occurred on the morning of Friday, the 24th November, owing to, or by the misconduct of, the prisoner, as laid in the indictment, then he is amenable to the law for such misconduct. It appears that the prisoner and his deceased wife had been separated for a considerable time, and that he had agreed to allow her 2s. 6d. a week. Though it does not distinctly appear, that this sum was paid punctually every week, still it does appear, that, on the Sunday preceding her death, the deceased had received the stipulated sum. There is, therefore, presumably, no ground for any charge against the prisoner, as having caused her death, from want of food, as the half crown would have supplied her from the Sunday till the Friday. The charge against the prisoner appears to

be, that he refused intentionally to provide her with shelter against the inclemency of the weather, she being at the same period of time in a state of disease progressively advancing, then very advanced indeed, and which, no doubt, would soon have ended her sufferings. For the four days preceding her death there is evidence of her state.

[The learned Baron here read over his notes of the evidence.] On the night of Wednesday, when the deceased was in the privy, the door was closed. The deceased was, therefore, in so far sheltered from the weather, and she requested the constable not to take her to the station-house, which is a remarkable fact, for there she would have found both shelter and warmth. The facts that particularly affect the prisoner in this case are, first, the request made to him by Mrs. Weller on Wednesday, when she asked him to take care of his wife, which he refused to do. This refusal was about mid-day on Wednesday, and you have heard stated in evidence the state in which the deceased woman then was. On the Wednesday evening in November, on a cold and rainy night, the constable knocks at the window of the prisoner's house, and states that his wife applies to him for shelter, but he shuts the window and refuses it. Such are the facts of the case. You will consider that he had regularly paid her allowance to her, and that he might have been compelled to pay her a larger sum if that had not been sufficient. Under ordinary circumstances he might have refused to have anything to do with her, but when she was ill, and without shelter, on a cold and wet night in November, the question assumes a different aspect; and it is this, whether you can certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than the event would have happened in the ordinary progress of the disease,—sooner, in a word, than if such refusal had not been given. That is really the question for your consideration. Many cases have been decided on the precise extent to which a father, husband, or master is bound to provide for his child, wife, or servant. But in those cases the parties were living under the roof of the parent, husband, or master, which implied a particular obligation. But here the circumstances are different, for the parties were actually separated. Whether this circumstance should take the case out of the ordinary rule, is a point which, if necessary, I will reserve for further consideration. But I will now take the opinion of you, gentlemen of the jury, as to whether the prisoner did, on the night of Wednesday, refuse to give his wife shelter, and whether his so refusing to do so, and leaving her in the state of bodily disease, in which she then was, exposed to the inclemency of the weather, accelerated her death. It does not appear in evidence that he knew what her disease was, or that she was afflicted with that mortal illness under which she laboured, or that she was suffering from the diarrhoea which caused her death; but he was, nevertheless, informed that she was very ill, and had not shelter. If you should be of opinion that her death was caused or accelerated by his conduct in refusing to give her shelter, you will say that he is guilty. If on the contrary you entertain any doubt on this point, you will acquit him. Various cases have occurred, and will, no doubt, occur again, in which, though juries may highly disapprove of, and reprobate the conduct of parties, yet in which, nevertheless, they cannot,

with safe consciences, convict them on a criminal charge. Verdict—Not guilty.¹

Recent cases, both in this country and in England, have led to a salutary application of the same general principle to the relations of parent and child, and master and apprentice. Fortunately, with the exception of those for exposure of young infants,² the trials of this nature arising from the first of these relations, have been but rare, but the law established by them, is, that if the death of a child be caused by premeditated negligence or harsh usage, it will be murder at common law; or where such distinction exists, murder in the second degree, unless it appear that the intention was actually to take life, when it will be murder in the first degree. In connexion with the relations of master and apprentice, there are several reported cases on this head. Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and stempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to lie in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical persons who were examined, was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and the medical persons inclined to think that, if he had been properly treated when he came home, he might have recovered; the court, under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill treatment he received from his master after returning from Bridewell, and whether that ill treatment amounted to evidence of malice; in which case they were to find him guilty of murder.³ And it is now held that the same principle applies to the withholding of proper food, so that death ensues. Thus, in a modern case, it appears that the prisoners, who were a husband and wife, had used the deceased, who was then apprentice, in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received. The court was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her: the husband, however, was found guilty and executed.⁴

A party who causes the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, is guilty of manslaughter. Upon an indictment for manslaughter, which charged the prisoner with giving a quartern of gin to a child of the age of four years, which caused its death, and which quantity of gin was averred to be excessive for a child of that age, it appeared that the prisoner

¹ *R. v. Plummer*, 1 Car. & Kir. 602-7.

² See *ante*, p. 93-97.

³ *Self's case*, 1 East, P. C. c. 5, s. 13, p. 226-7; 1 Leach, 137.

⁴ *R. v. Squire and his wife*, Stafford Lent Assizes, 1799. 1 Rus. on Cr. 491.

having ordered a quartern of gin, asked the child if it would have a drop, and that on his putting the glass to the child's mouth, the child twisted the glass out of his hand, and swallowed nearly the whole of the gin, which caused its death. Vaughan, B., "As it appears clearly that the drinking of the gin in this quantity was the act of the child, the prisoner must be acquitted; but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter, because I have no doubt that the causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, amounts, in point of law, to that offence."¹

And so where an opiate is unduly administered to a child with intent to produce artificial quiet, and death ensue, it is manslaughter. Thus on an indictment for the murder of an infant by the administration of laudanum, when the judge below charged the jury, that "if Ann, a slave, without authority, administered laudanum to the infant, with the intent to produce unnecessary sleep, and contrary to her expectations it caused death, she would be guilty of murder." The Supreme Court held this charge to be erroneous, ruling that the administration of laudanum was not *per se* unlawful, and that as the charge excluded from the jury the consideration of the fact, whether the defendant intended serious mischief to the infant or not, and whether the offence amounted to murder or manslaughter, a new trial should be awarded.² "The plaintiff in error," said McKinney, J., in delivering the opinion of the court, "was indicted jointly with another slave named Tom, in the Circuit Court of Williamson, for the murder of Mary E. B. Marr, the infant child of their master and mistress. The jury acquitted Tom, and found the plaintiff in error guilty as charged in the indictment. The court refused to grant a new trial, and pronounced judgment of death upon the prisoner, from which an appeal in error has been prosecuted to this court. It is not necessary in the view we have taken of the case, to state the evidence in detail; a mere outline will be sufficient to raise the questions of law presented for our determination, except the question in relation to the admissibility of the prisoner's confession. The infant, of whose murder the prisoner stands convicted, was of extremely tender age, only five weeks old; and the death was caused by an over dose of laudanum administered by her, without the knowledge of any one, and contrary to a general command, not to give the child anything whatever. The prisoner is of immature age, being, at the time of the alleged murder, not over fifteen years. A day or two preceding the death of the infant, the prisoner was taken from the negro quarter on the plantation, and put in the house to serve in the capacity of nurse. On the day of the infant's death, Mrs. Marr went into another room to attend to some domestic affairs, leaving the child asleep in the cradle, in the charge of the prisoner; she remained absent about fifteen minutes, as she supposes, during which time the laudanum was administered. The child survived about four hours. A physician was immediately sent for, but did not arrive until about two hours after

¹ R. v. Martin, 3 C. & P. 211.

² Ann v. State, 11 Murp. 159.

the laudanum was given, and his efforts to counteract its effect were unavailing. He states that the death was caused by an over dose of laudanum, and that half a drop was as large a dose as the infant could have borne. The prisoner for some time denied having given laudanum to the infant. Her master was much excited: inflicted blows with his hand upon the prisoner: threatened to shoot her; but was induced to desist by the persuasions of his wife, and sent her off to the quarter, where she was put in chains around her body and neck. On Saturday evening, after the death of the child, which happened on the preceding day, Nichols, the overseer of Marr, and Giles, overseer of Perkins, who lived on an adjoining farm, went together after night to the house where the prisoner was confined. Giles states that she was asked by him, "how she came there;" seemed slow in speaking. Nichols told her to speak. She then said she had given laudanum to the baby, and it had killed it. He then asked her how she came to do it? She said Tom had been at her to meet him out at night, and told her if she would give it laudanum it would sleep until she could get back; that she asked him if it would hurt: he said no, he had given it many times to his wife Eliza, and it never hurt her. She was told she had better come out and tell the truth, it would be better for her. She was asked if she would make the same statement before Tom that she had made to witness and Nichols. She said she would. Witness and Nichols then went to Tom's house and took him into the house where the prisoner was, and told her to tell her tale again. She said Tom had recommended her to give it, and that it would make the baby sleep till she could get back; and she asked him if it would hurt. Tom denied all this. She said she thought she would try and see if it would make it sleep, and had poured some in her hand and given it. That since she had been chained, that Tom had been there and told her that she had given it wrong—that she ought to have put some brandy in it, and sweetened it, and then the child would not have died in several days; that he told her she must admit that she had given it, but not to call his name or he would shorten her days. Tom denied all this. Witness further stated, that in the first talk with her he told her it would be better for her to come out and tell the truth. Nichols' statement of the prisoner's confession is somewhat different from that of Giles'; but we have thought proper to take the latter as probably the more correct and reliable statement. There is proof in the record of an improper intimacy having existed between Tom (who was of mature age) and the prisoner, for some weeks previous to the removal of the latter from the quarter to the house. The witness Nichols speaks of one occasion when he detected them, but, he says, he "passed on and said nothing, as it was no business of his, and he did not care what they did." Judging from this avowal of the overseer, the morals of the slaves under his dominion were in bad keeping; and it is not much to be wondered at that the prisoner, who was brought up at the quarter, had a more imperfect sense of the obligations of morality and common decency than is even usual among those of her own caste and social condition. The circuit judge, in his instructions to the jury, after stating the general definition of murder and malice, and laying down some general principles, the correctness of which is not

questioned, said: "If Ann, the prisoner, by force poured laudanum into the mouth of Mary E. B. Marr, such act, unless excused or justified by the evidence, would amount to a battery, and she would be responsible in law for the natural effects of the laudanum, although they may have been more serious than she designed or expected. If Ann was the slave of Nicholas Marr, the witness, and was employed by him to attend Mary E. B. Marr, and if she was ordered by her master not to administer any thing to the said Mary E. B. Marr; if she without authority wilfully administered laudanum to said Mary, intending thereby to produce unnecessary sleep, and contrary to her expectations it caused death, she would be guilty of murder." The first question for our consideration is,—Was the confession of the prisoner, which was objected to, properly admitted as evidence to the jury? This is a question which admits of no discussion. All authorities concur, that a confession, to be admissible as evidence, must have been freely and voluntarily made, and not under the influence of promises or threats. As to what is such a promise or threat as will exclude a confession, it is laid down, that saying to a person it will be worse for him if he do not confess; or, that it will be better for himself if he do, is sufficient to exclude the confession.¹ So, where a surgeon called to see a prisoner charged with murder said to her, "you are under suspicion of this, and you had better tell all you know," the confession was held inadmissible.² So where it was said to the prisoner, "it would have been better if you had told at first," the confession was rejected.³ It would be a useless labour to multiply authorities upon a point in respect to which there is no substantial disagreement to be found in the books. Nor would it be more profitable to indulge in speculation as to the probable influence of such a promise or threat in a particular case: certainly not in the case of a timid girl, of tender age, ignorant and illiterate, a slave and in chains, whose life had been threatened by her master, and against whom the hand of every one, even those of her own colour and condition, seems to have been raised. In such case, and in all cases, the law conclusively presumes that an influence was exerted upon the mind of the prisoner, and, therefore, all inquiry upon the subject is precluded. 2d. The next question is, was the law correctly stated to the jury? We think not. The error of the charge will be obvious from the mere statement of a few plain elementary principles. To constitute the crime of murder by the common law, and by that law this case is to be governed, the killing must be with malice aforethought, no matter by which of the thousand means adequate to the destruction of life, the death may have been effected. Malice, in its legal sense, is the sole criterion by which murder is distinguished from every other species of homicide. The malice essential to constitute the crime of murder, however, is not confined to an intention to take away the life of the deceased, but includes an attempt to do any unlawful act, which may probably result in depriving the party of life. "It is not," in the language of Blackstone, "so properly spite or malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart: and

¹ 2 East, P. C. 659.

² 4 C. & P. 381.

³ 6 C. & P. 175.

it may be either express or implied in law.”¹ If an action unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm, to particulars, or of mischief indiscriminately, fall where it may, and death ensue; against or beside the original intention of the party, it will be murder. But, if such mischievous intention do not appear, (which is a matter of fact to be collected from the circumstances) and the act was done heedlessly and incautiously, it will be manslaughter only.² But, if the death ensue in the performance of a lawful act, it may amount either to murder, manslaughter, or misadventure, according to the circumstances by which it is accompanied.³ These general principles apply as much to a case where death ensues by means of a medicine of pernicious qualities, as to any other species of homicide. It is true, that where one wilfully poisons another, from such deliberate act the law presumes malice, though no particular enmity can be proved.⁴ But this presumption may be displaced in case of death from poison, as in other cases, by direct proof, or by the circumstances of the particular case. If, as Blackstone says, the poison were wilfully administered, that is, with the intent that it should have the effect of destroying the life of the party; or, if in the language of Foster, the act were “done deliberately and with intent of mischief, or great bodily harm,” and death ensue, it will be murder. But, if it were not wilful, and such deliberate mischievous intention do not appear; and the act was done heedlessly, and incautiously, it will be only manslaughter at the most. Testing the charge by these familiar principles, it is manifestly incorrect in several respects. It assumes that if the prisoner administered the laudanum in violation of her master’s order, for the purpose of “producing unnecessary sleep,” and death ensued, contrary to her intention, she is guilty of murder. This is not law. In the first place, the charge puts the disobedience to the master’s order, on the same footing with a violation of a command, or prohibition of the law. This is a great mistake. Such violation of her master’s order is not an “unlawful act” in the sense of the rule above stated. It is no offence against the law of the land; nor is it cognisable by any tribunal created by law. It is an offence simply against the private authority of the master, and is cognisable and punishable alone in the domestic forum. Again, the criminality of the act is made to depend upon an intent with reference to the deceased infant, which may be in law, if not positively innocent, at least comparatively so. The laudanum may have been given by the prisoner in utter ignorance of the fact that it possessed any poisonous quality, and there may have been a total absence of any intention to do serious injury, or indeed injury of any sort, much less to destroy the life of the child. If the prisoner’s purpose really was, to superinduce a state of temporary quietude or sleep, without more, in order to afford better opportunity, or greater facility, for carrying on her own illicit intercourse with Tom, this, however culpable in morals, would not involve her in the guilt of murder. The tenderest of mothers might administer laudanum to her infant incautiously, in order to be enabled to attend some pressing call of her household affairs, which admitted of no delay; or a gay

¹ 4 Bl. Com. 199, 200.

² Fost. 262; 1 Hale, 472; 4 Bl. Com. 192.

² Fost. 261.

⁴ 4 Bl. Com. 199.

and thoughtless matron, devoted to the pursuit of pleasure, though not devoid of natural affection for her infant, might give a similar dose, in order to have an opportunity to attend the theatre or ball-room for a time. And although in both the latter cases the motive, as far as respects the actors, is different, and less offensive to morals or propriety, yet the purpose or intention, with reference to the effect to be produced upon the child, is the same, in kind at least, that is, in the language of the charge, to "produce unnecessary sleep." And, yet, perhaps, no one would contend that had death ensued, in either case, the mother would have been guilty of either murder or manslaughter. In the case of the prisoner, her relation as a slave, taken in connexion with her disregard of her master's positive directions, and the gross heedlessness and incautiousness of the act, might constitute her offence manslaughter, but certainly nothing more. The charge of the court then is not only erroneous in excluding from the consideration of the jury, the questions of fact, whether or not the prisoner had knowledge of the poisonous qualities of laudanum, and whether or not there existed in the mind of the prisoner an intent to kill, or to do serious injury to the deceased, but likewise in not submitting it to the jury to determine the grade of the offence, whether murder or manslaughter. If the offence amounted to no more than manslaughter, as we hold to be clear, then the Circuit Court had no jurisdiction of the case. In the case of Nelson, a slave, *v. the state*, at the last term at Jackson, it was held that, by our law, manslaughter might be committed by a slave; but that the circuit court had no jurisdiction of such case. In delivering the judgment of the court in that case, Judge Green says, it is true, an indictment against a slave for murder, does not include a charge of manslaughter, because by the act of 1819, ch. 35, sec. 1, murder, committed by a slave, is declared to be capital, and by the act of 1835, ch. 19, sec. 9, exclusive original jurisdiction is given to the Circuit Courts, of all offences committed by slaves, which are punishable with death; and as manslaughter is not so punishable, the Circuit Court has no jurisdiction thereof. By the act of 1815, ch. 18, s. 38,¹ a special tribunal, consisting of three justices, and nine freeholders and slaveholders, is created for the trial of all offences committed by slaves, that are not capital, with authority to "pass such judgment according to their discretion, as the nature of the crime or offence shall require," not affecting life or limb. By the act of 1819, ch. 35, sec. 1, murder, arson, burglary, rape and robbery, when committed by slaves, are declared capital, and to be punished with death; and all other offences are to be punished as heretofore, provided, however, that such punishment shall not extend to life or limb. The judgment of the Circuit Court will be reversed.²

At common law, the master is not obliged to provide medical attendance for a sick servant, though in this country under the institution of slavery he undoubtedly is; and where apprenticeship exists, he is commonly responsible if the apprentice suffers from want of proper medicines or attendance.³ An indictment for manslaughter in one count alleged that the deceased was the apprentice of the prisoner,

¹ 2 Scott's Rev. 246-7.

² *Ann v. State*, 11 *Humph. R.* 159, &c.

³ *Sellen v. Norman*, 4 C. & P. 80; *R. v. Smith*, 8 C. & P. 163.

and that it was his duty to provide sufficient food for her as such apprentice, and that he neglected to do so, &c., by means of which she died; and in another count it was alleged that the deceased was the servant of the prisoner, and that it was his duty to provide her with food, &c. An invalid indenture of apprenticeship was put in, and it appeared that the deceased had always been treated as an apprentice by the prisoner, and had performed such duties as an apprentice would have performed, but the prisoner being a farmer, these duties were the same as those performed by ordinary farmers' servants. It was objected that the first count was not proved, as the indenture was invalid; and that the relation of master and servant never existed, for an invalid contract of apprenticeship could not be converted into a hiring and service: that the foundation of this indictment was that the prisoner was legally bound to provide maintenance for the deceased, and here it was clear he could neither have been compelled to support her as an apprentice or as a servant. But it was held that the prisoner having treated the deceased as his servant, could not turn round and say she was not his servant at all.¹ And so also where one count stated that the deceased was the apprentice of the prisoner, and that it was his duty to provide the deceased with proper and necessary nourishment, medicine, medical care and attention, and charged the death to be from neglect, &c. A second count averred that the deceased "so being such apprentice as aforesaid," was killed by the prisoner by over-work and beating; and the only evidence given to show that the deceased was an apprentice, was, that the prisoner had stated that he was an apprentice. Patteson, J., held that there was sufficient evidence to support the second count, but not the first.²

Much doubt exists as to the legal obligation of a father to support an illegitimate child, though as to the fact of the moral duty, there can be no question.³ Puffendorf tells us⁴ that "maintenance is due not only to legitimate children, but even to incestuous issue." But be this as it may, it is clear that when a party assumes the guardianship of a child, whether as putative or step parent, he becomes responsible for mismanagement or neglect. If he inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies of a disease hastened by such ill treatment, it will be murder if the treatment was of such a nature as to indicate malice; but if such person believed that the child was shamming illness, and was really able to do the work required, it will only be manslaughter, although the punishment were violent and excessive.⁵

And the same law undoubtedly obtains in the case of a school-master, who stands *in loco parentis*. And where correction is applied, it must be moderate, for where it exceeds the bound of moderation, and reaches that of cruelty, or when it is inflicted merely for caprice or malice, the perpetrator is answerable for the consequences.⁶ Under

¹ R. v. Davies, Hereford Sum. Ass. 1831, Patteson, J., MS.; 1 Russ. on Cr. 491.

² R. v. Crumpton, 1 C. & Mars. 597.

³ Nichols v. Allen, 3 C. & P. 36.

⁴ Book 4, c. 11, s. 6.

⁵ R. v. Conner, 6 C. & P. 438; R. v. Cheeseman, Ibid. 455.

⁶ Fost. 262; 1 Hale, 454; Johnson v. State, 2 Humph. 283; State v. Pendergrass, 2 Dev. & Bat. 407; Reeve's Dom. Rel. 288.

the system prevailing in some of the American States of letting out insane or infirm paupers to private persons at minimum bids, many cases of hardship have arisen and must arise. In these the law has uniformly been held to be, that where a party undertakes to provide necessaries for a person who is so aged and infirm that he is incapable of doing so for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible. In an English case, upon an indictment for murder, which stated that the deceased was of great age, and was residing in the house and under the care and control of the prisoner, and that it was his duty to take care of and find her sufficient meat, &c., and then alleged her death to have been caused by confining her against her will, and not providing her with meat and other necessaries; it appeared that she was seventy-four years of age, and that upon the death of her sister, with whom she had lived, the prisoner, who attended the funeral, took the deceased home with him, saying she was going home to live along with him till affairs were settled, and he would make her happy and comfortable; and on another occasion the prisoner had said that in consideration of a transaction, which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived. When the deceased first went to the prisoner's a servant was kept, and the deceased lodged in the back parlour, afterwards she was removed into the kitchen. After some time no servant was kept, and the deceased was waited on by the prisoner and his wife, and she remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together; and on several occasions had complained of being confined: in the cold weather no fire was discernible in the kitchen, and for some time before her death, the deceased was continually locked in the kitchen, and not out of it at all. An undertaker's man stated that, from the appearance of the body, he thought she had died from want and starvation. A surgeon proved that the immediate cause of death was water on the brain: that the appearance of all parts of the body betokened the want of proper food and nourishment, and that there was great emaciation of the body, and that the water on the brain might have been produced by exhaustion. Patteson, J. "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased, then he will be guilty of murder; if, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she from age and infirmity, was incapable of doing." * * * "This is the evidence on which you are called to infer that the prisoner undertook to provide the deceased with necessaries: and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible."¹

¹ R. v. Marriott, 8 C. & P. 425, Patteson, J.

IV. MEDICAL MEN, APOTHECARIES, ETC.

Judicial sentiment on the subject of mal-practice by medical attendants has been characterized by much vacillation. The original ground taken was, that if a physician or surgeon give his patient a potion or plaster, intending to do him good, and, contrary to the expectation of such physician, or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure.¹ It was then held, that if the medicine were administered, or the operation performed, by a person not being a *regular* physician or surgeon, the killing would be manslaughter at the least.² Thus in a case decided in 1829, where the prisoner was indicted for manslaughter, it appeared that the deceased had been discharged from the Liverpool Infirmary as cured, after undergoing salivation, and was recommended to go for an emetic to get the mercury out of his bones, to the prisoner, an old woman, who occasionally dealt in medicines, and she gave him a solution of white vitriol, or corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland. Bayley, J., said, "I take it to be quite clear that if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one; but he has no right to hazard the consequence in a case where medical assistance may be obtained; if he does so, it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another."³

But the English, and as will presently be seen, the American law now is that the want of a degree, (unless there be a special statute on the subject,) adds nothing to the grade of the offence, if there be a *bona fide* and honest attempt by the defendant to do his best. Thus, where in a prosecution for mal-practice it was proposed to show that the prisoner had had a regular medical education, and that a great number of cases had been successfully treated by him, Hullock, B., (stopping the case,) said, "This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion that it makes no difference whether the party be a regular or irregular surgeon; indeed, in remote parts of the country many persons would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law books⁴ have said has been read to you, but they do not state any decisions, and their silence in this

¹ 4 Blac. Com. 197; 1 Hale, 429.

² Brit. c. 5; 4 Inst. 251.

³ R. v. Simpson, Willcock's L. Med. Prof. Append. 227.

⁴ 4 Bl. Com. 197, 1 Hale, P. C. 429; 4 Inst. 251.

respect goes to show what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation; however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Mr. J. Blackstone, and no book in the law goes any further. It may be that a person not legally qualified to practise as a surgeon may be liable to penalties, but surely he cannot be liable to an indictment for felony. It is quite clear you may recover damages against a medical man for want of skill; but as my Lord Hale¹ says, 'God forbid that any mischance of this kind should make a person guilty of murder or manslaughter.' Such is the opinion of one of the greatest judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation, which causes a patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. L. has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vox-ata quæstio* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter."²

Varying but slightly from this case is one of about the same date, in which Lord Ellenborough told the jury,—“To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill.”³

It is obvious, that the position just taken, depends upon the honesty and *bona fides* of the practitioner. Where, however, he is pursuing a plan of bold imposture, the case is otherwise, and this whether he be with or without a degree. The cases that come nearest to the application of this doctrine, (though the circumstances did not directly evolve it) are those of St. John Long, in England, and Thompson in this country. Two prosecutions against the former are reported. The first was on an indictment for manslaughter by feloniously rubbing, sponging and washing Miss C. with a certain inflammatory and dangerous liquid. It appeared that two of her family had died of consumption, but that she had enjoyed good health, till her mother, Mrs.

¹ 1 Hale, P. C. 429.

² R. v. Van Butchell, 3 C. & P. 629, coram Hullock, B., and Littledale, J. Verdict, not guilty.

³ R. v. Williamson, 3 C. & P. 635. In addition to the facts above stated, it was proved that the prisoner had attended the deceased in seven previous confinements with perfect success, and that the deceased wished him to attend her in her last confinement. See C. & P. 407, note (a.)

C., hearing of an assertion of the prisoner that unless Miss C. put herself under his care she would die of consumption in two or three months, placed her under his charge. The prisoner was accustomed to rub a mixture on different parts of the bodies of his patients, and this had been applied to Miss C. on the 3rd of August, by the prisoner's servant, and by his direction. On Friday, the 13th of August, a witness went with Miss C. to the prisoner's, respecting a wound on her back, and Miss C. then "inhaled;" on the next day the prisoner examined her back, and said it was in a beautiful state, and that he would give one hundred guineas if he could produce a similar wound on the persons of some of his patients. His attention being directed to a part of the wound which was of a darker appearance, he stated that this proceeded from the inhaling, and that unless those appearances were produced he could expect no beneficial result. The wound at this time was about five or six inches square. Miss C. was suffering much from sickness, and the prisoner said that it was of no consequence, but, on the contrary, a benefit; and that those symptoms, combined with the wound, were a proof that his system was taking due effect. On Sunday, the 15th, Miss C. having got worse, the prisoner said that in two or three days she would be better in health than she had ever been in her life, and spoke very confidently that the result of his system would prolong her life, and that no person could be doing better than she was. At this interview the wound, which had extended, was shown to the prisoner. At the same time he was desired to do something to stop the sickness, but he said he had a remedy in his pocket, which he would not apply, as he knew the sickness had been beneficial: and he also stated on that day, and on Monday, the 16th, that Miss C. was doing uncommonly well. On Tuesday, the 17th, she died. An eminent surgeon proved that on the Monday her back was extensively inflamed as large as a plate, and in the centre was a spot, as large as the palm of the hand, black, and dead, and in a mortified state, and he thought that some very powerfully stimulating liniment had been applied to her back; that applying a lotion of a strength capable of causing the appearances he saw, to a person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. The appearances on the back were quite sufficient to account for her death. On the most careful examination of the body, after death, no latent disease or seeds of disease were discovered. It was submitted, for the defence, that, in point of law, this was nothing like a case of manslaughter, and 1 *Hale, P. C.*, 429, 4 *Bl. C. b.* 4, c. 14, and *Rex v. Van Butchell*, were cited and relied on. The learned judges who sat in the case at first differed in opinion. Park, J. A. J., said, "I am in this difficulty; I have an opinion, and my learned brother differs from me; I must, therefore, let the case go to the jury." Garrow, B., "In *Rex v. Van Butchell*, the learned judge had very good ground to stop the case, as there was no evidence as to what had been done. I make no distinction between the case of a person, who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the president of the College of Physicians, the president of the College of Surgeons, or

the humblest bone-setter of the village; but be it the one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages? Because the parties are bound to have skill, care, and caution. I am of opinion that, if a person, who has ever so much or so little skill, sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk, and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution." Park, J., in summing up, charged the jury to the following effect: "The learned counsel truly stated in the outset, that whether the party be licensed or unlicensed is of no consequence, except in this respect that he may be subject to pecuniary penalties for acting contrary to charters or acts of Parliament; but it cannot affect him here. (After citing 1 *Hale*, 429, as an authority in point, the learned judge proceeded,) "I agree with my learned brother, that what is called *mala praxis* in a medical person is a misdemeanor; but that depends upon whether the practice he has used is so bad that every body will see that it is *mala praxis*. The case at Lancaster differs from this case. I have communicated with C. J. Tindal, who tried that case, and he informed me that the man was a blacksmith, and was drunk, and so completely ignorant of the proper steps, that he totally neglected what was absolutely necessary after the birth of the child. That certainly was one of the most outrageous cases that ever came into a court of justice. I would rather use the words of Lord Ellenborough in *Rex v. Williamson*." (His Lordship read them.) "And this is important here, for though he be not licensed, yet experience may teach a man sufficient; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention?" (After setting the authority of *Hale*, P. C. 429, against the dictum of Lord Coke, 4 *Inst.* 251, and citing the observations of Hullock, B., in *Rex v. Van Butchell* with approbation, his Lordship proceeded,) "The refusal by the prisoner to apply the medicine to stop the sickness, although he had it with him, would, in my opinion, if wickedly done, amount to murder; but he mentioned a case in which sickness had been beneficial. Undoubtedly the result proves a very erroneous opinion on his part, and it seems singular that the restlessness and other circumstances did not awaken apprehension, and call for further measures, but the question again recurs, whether this was an erroneous judgment of a person, who was of general competency, though he unfortunately failed in the particular instance." "With respect to the application of the mixture, if he commanded the servant to use it, it is the same as if he used it himself. Perhaps from the evidence you will think that the act caused the death; but still the question recurs, as to whether it was done from gross ignorance or criminal inattention. No one doubts Mr. B.'s skill, but that is not quite the question; it is not whether the act done is the thing that a person of Mr. B.'s great skill would do, but whether it shows such total and gross ignorance in the person who did it, as must necessarily produce such a result. On the one hand we must be careful and most anxious to prevent people from tampering in physic

so as to trifle with the life of man; and, on the other, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case." "If you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty; if you do not think so, then your verdict will be otherwise."¹

Six months afterwards the same defendant was further tried under a similar charge, though this time before Mr. Baron Bayley, Mr. Baron Holland, and Mr. Justice Bosanquet. From the testimony of Captain Lloyd, the husband of the deceased, it appeared that she put herself under the defendant's care on the 6th of October, at which time she was in very good health, to be cured of a complaint she had in her throat. On the 3rd she had applied a small blister to her throat, but the wound occasioned by it was nearly well on the 6th. On the 7th, 8th, 9th, and 10th she went to the prisoner's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th she was very unwell all the day, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied. On the 12th, the redness on the breast and chest was, if anything, greater. In consequence of the symptoms, the husband went to the prisoner, who asked why Mrs. L. had not come to inhale, and go on with the rubbing; the husband replied it was impossible, she was so ill; she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness: the prisoner said it would soon go off, it was generally the case. He was told of the shivering and chilliness, and that some hot wine and water had been given to relieve her; he said hot brandy and water would have been better, and to put her head under the bed clothes. He was told that her chest and breast looked very red and very bad; he said that was generally the case in the first instance, but it would go off as she got better, and that the husband need not be uneasy about it, as there was no fear or danger. In the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. In the evening the prisoner came and saw Mrs. L. and looked at her breast, and observing the dressing, said those greasy plasters had no business there, and she ought to have continued the cabbage leaves. She said she could not bear the pain of keeping them on. He then took off his great coat and said that he would rub it out, and turned up the cuff of his coat as if for the purpose of doing so. She exclaimed very much with fright, and expressed her wonder that he should think of rubbing in the state her breast was in. She asked if there was no way of keeping the leaf on without touching the breast; and he asked her what she wished; she replied to be healed. He said it would never heal with those greasy plasters; that was not the way in which he healed sores. He then asked for a

¹ B. v. St. John Long, 4 C. & P. 398.

towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said that old linen was the best thing to heal a wound of that kind. She said her skin and flesh were very healthy, and always healed immediately with the simple dressing she had used. He said old linen was better, but she might use the dressing if she liked it, he saw no objection, and, when it skinned over, he would rub it again. He never saw her afterwards; she died on the 8th of November. Mr. Campbell, a surgeon who was called afterwards to visit the deceased, proved that on the 12th of October he found a very extensive wound covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid; the skin was destroyed, the centre of the wound was darker, and in a higher state of inflammation than the other parts; he considered the wound very dangerous to life when he first saw it; the centre spot, and the upper part became gangrenous in about a week; and in his opinion Mrs. L. died of the wound, and according to his judgment it was not necessary or proper to produce such a wound to prevent any difficulty in swallowing, and he did not know of any disease, in which the production of such a wound would be necessary or proper. The body was internally and externally in perfect health, except a little narrowness at the entrance of the *œsophagus*. Mr. Vance, another surgeon, corroborated the testimony of Mr. Campbell, saying that he thought that a man of common prudence or skill would not have applied a liquid, which in two days would produce such extensive inflammation; though all irritating external applications sometimes exceeded the expectations of the medical attendant; but he should say that such conduct was a proof of rashness and of ignorance. Mr. Atley, for the defendant, after examining the sufficiency of the evidence, took the ground that this was not manslaughter, but homicide *per infortuniam*; that the safety of society required a liberal rule, for if a man acting with a good intent is held liable, the knife will tremble in the surgeon's hand; that where the mind is pure, and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed, which fails, the party is not responsible; and that the indictment, which in substance charged that the death was occasioned by the external application, was not supported. He proceeded to urge that there was no difference in this respect between licensed and unlicensed practitioners. Bayley, B., said, "I agree with Lord Hale, and do not think that there is any difference between a licensed and unlicensed surgeon. It does not follow in the case of either, an act done may not amount to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be laid out of the question in this case. But the manner in which the act is done, and the use of due caution, seem to me to be material. Mr. J. Foster, in his Criminal Law, p. 263, speaking of a person who happens to kill another by driving a cart or other carriage, says, "If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection*." And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that there being conflicting authorities, and the impression on our minds, not being in your favour, I

propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act; for if a man, either with gross ignorance, or gross rashness administers medicine and death ensues, it will be clearly felony. Mr. Atley, for the prisoner, then insisted that in this case, as in larceny, there must be a trespass proved. Trespass was the foundation stone of felony. It was not proved that any fraud had been practised by the prisoner to get the patient under his care; nor had there been any avaricious seeking after fees: if there had been, it might have been evidence to show the existence of trespass. The prisoner's conduct showed his intentions to have been good and honest. In *Rex v. Van Butchell*, the case was stopped, because there was no evidence of how the operation was performed, and here there was not any evidence to show the mode in which the application was made. Bayley, B., said, "In this case we may judge of the thing by the effect produced, and that may be evidence from which the jury may say, whether the thing which produced such an effect was not improperly applied." Bolland, B., said, "When you pass the line which the law allows, then you become a trespasser." Mr. Adolphus then took the ground that a party could not be convicted of manslaughter whose intentions were only *helpful*. It was agreed, however, that if the court thought the point had better be reserved, no further observations would be offered. Bayley, B., said, "If I had a clear opinion in your favour, or if my brothers had, or if we had any reason to think that other judges were of a different opinion, it would become our duty to give our opinion here, and prevent the case from going to the jury: but feeling as I do, notwithstanding all I have heard to-day, and myself and my brothers having had our attention directed to the law before we came here, I think it right that the case should go to the jury; I think that if the jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness; and I consider that *rashness will be sufficient* to make it manslaughter. As for instance, if I have the tooth-ache, and a person undertakes to cure it by administering laudanum, and says, 'I have no notion how much will be sufficient,' but gives me a cup full, which immediately kills me; or if a person prescribing James's powder says, 'I have no notion how much should be taken,' and yet gives me a table spoonful, which has the same effect; such persons acting with rashness will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and *the willingness of the patient cannot take away the offence against the public.*" The prisoner on his defence offered considerable evidence of skill, and charged negligence on the attending surgeon. Bayley, B., in his charge to the jury, said, "The points for your consideration are, first, whether Mrs. L. came to her death by the application of the liquid; secondly, whether the priso-

ner, in applying it, has acted feloniously or not. To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, *he has acted with a due degree of caution*, or, on the contrary, has acted with *gross and improper rashness and want of caution*. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." "If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and that it was the cause of Mrs. L.'s death, then, heavy as the charge against him is, he will be answerable on this indictment for the offence of manslaughter. There was a considerable interval between the application of the liquid, and the death of the patient, yet if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say that a different course of treatment by Mr. C. might have prevented it. You will consider these two points: first, of what did Mrs. L. die? You must be satisfied that she died of the wound, which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied of this, whether the application was a felonious application; this will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects in such a manner that it did actually produce them. If you think so then he will be answerable to the full extent."¹ The defendant was acquitted.

The same points were discussed on a trial in Massachusetts, in 1809, before Sewall, J., and Parker, J., of the Supreme Court. The defendant, Thompson, was indicted for the murder of Ezra Lovett, by giving him a poison called *lobelia*, of which he died the next day after the dose. On the trial it appeared in evidence, that the prisoner, some time in the preceding December came into *Beverly*, where the deceased then lived, announced himself as a physician, and professed an ability to cure all fevers, whether black, gray, green or yellow: declaring that the country was much imposed upon by physicians, who were all wrong if he was right. He possessed several drugs, which he used as medicines, and to which he gave singular names. One he called *coffee*; another *well-my gristle*; and a third *ram-cats*. He had several patients in *Beverly* and in *Salem*, previous to Monday, the second of January, when the deceased, having been for several days confined to his house by the cold, requested that the prisoner might be sent for as a physician. He accordingly came, and ordered a large fire to be kindled to heat the room. He then placed the feet of the deceased, with his shoes off, on a stove of hot coals, and wrapped him in a thick blanket, covering his head. In this situation he gave him a powder in water, which immediately "puked" him. Three minutes after, he repeated the dose, which in about two minutes operated violently. He again repeated the dose, which in a short time operated with more violence. These doses were all given within the space of half an

¹ R. v. St. John Long, 4 C. & P. 423; Bayley and Bolland, Bs., and Bosanquet, J.

hour, the patient in the mean time drinking copiously of a warm decoction, called by the prisoner his *coffee*. The deceased, after puking, in which he brought up phlegm, but no food, was ordered to a warm bed, where he lay in a profuse sweat all night. Tuesday morning the deceased left his bed, appeared to be comfortable, complaining only of debility; and in the afternoon he was visited by the prisoner, who administered two more of his emetic powders in succession, which puked the deceased, who during the operation, drank of the prisoner's *coffee*, and complained of much distress. On Wednesday morning the prisoner came, and after causing the face and hands of the deceased to be washed with rum, ordered him to walk in the air, which he did for about fifteen minutes. In the afternoon the prisoner gave him two more of his emetic powders, with draughts of his *coffee*. On Thursday the deceased appeared to be comfortable, but complained of great debility. In the afternoon the prisoner caused him to be again sweated, by placing him with another patient, over an iron pan with vinegar heated by hot stones put into the vinegar, covering them at the same time with blankets. On Friday and Saturday the prisoner did not visit the deceased, who appeared to be comfortable, although complaining of increased debility. On Sunday morning, the debility increasing, the prisoner was sent for, and came in the afternoon, when he administered another of his emetic powders with his *coffee*, which puked the diseased, causing him much distress. On Monday he appeared comfortable, but with increasing weakness, until the evening; when the prisoner visited him, and administered another of his emetic powders, and in about twenty minutes repeated the dose. This last dose did not operate. The prisoner then administered pearl-ash mixed with water, and afterwards repeated his emetic potions. The deceased appeared to be in great distress, and said he was dying. The prisoner then asked him how far the medicine had got down: The deceased, laying his hand on his breast, answered *here*: on which the prisoner observed that the medicine would soon get down, and unscrew his navel: meaning, as was supposed by the hearers, that it would operate as a cathartic. Between nine and ten o'clock in the evening, the deceased lost his reason, and was seized with convulsion fits; two men being required to hold him in bed. After he was thus seized with convulsions, the prisoner got down his throat one or two doses more of his emetic powders; and remarked to the father of the deceased, that his son had got the *hypos* like the devil, but that his medicines would fetch him down; meaning as the witness understood, would compose him. The next morning the regular physicians of the town were sent for, but the patient was so completely exhausted, that no relief could be given. The convulsions and the loss of reason continued, with some intervals, until Tuesday evening, when the deceased expired. From the evidence it appeared that the *coffee* administered was a decoction of *marsh-rosemary*, mixed with the bark of *bayberry bush*, which was not supposed to have injured the deceased. But the powder which the prisoner said he chiefly relied upon in his practice, and which was the emetic so often administered by him to the deceased, was the pulverized plant, familiarly called *Indian tobacco*. A Dr. French of *Salisbury* testified that this plant, with this name, was well known in his part of the country,

where it was indigenous, for its emetic qualities; and that it was gathered and preserved by some families, to be used as an emetic, for which the roots, as well as the stalks and leaves, were administered; and that four grains of the powder was a powerful puke.—But a more minute description of this plant was given by the Rev. Dr. Cutler. He testified that it was the *lobelia inflata* of Linnæus: that many years ago, on a botanical ramble, he discovered it growing in a field not far from his house in *Hamilton*: that, not having *Linnæus* then in his possession, he supposed it to be a nondescript species of the *lobelia*: that by chewing a leaf of it, he was puked two or three times: that he afterwards repeated the experiment with the same effect: that he inquired of his neighbour, on whose ground the plant was found for its trivial name. He did not know of any; but was apprized of its emetic quality, and informed the doctor that the chewing of one of the capsules operated as an emetic, and that the chewing more would prove cathartic. In a paper soon after communicated by the doctor to the American Academy, he mentioned the plant, with the name of the *lobelia medica*. He did not know of its being applied to any medical use until the last September, when being severely afflicted with the asthma, Dr. Drury of Marblehead informed him that a tincture of it had been found beneficial in asthmatic complaints. Dr. C. then made for himself a tincture, by filling a common porter bottle with the plant, pouring upon it as much spirit as the bottle would hold, and keeping the bottle in a sand heat for three or four days. Of this tincture he took a table spoonful, which produced no nausea, and had a slight pungent taste. In ten minutes after he repeated the potion which produced some nausea, and appeared to stimulate the whole internal surface of the stomach. In ten minutes he again repeated the potion, which puked him two or three times, and excited in his extremities a strong sensation like irritation: but he was relieved from a paroxysm of the asthma, which had not since returned. He had since mentioned this tincture to some physicians, and has understood from them, that some patients have been violently puked by a tea spoonful of it: but whether this difference of effect arose from the state of the patients, or from the manner of preparing the tincture, he did not know. The solicitor general also stated that before the deceased had applied to the prisoner, the latter had administered the like medicines with those given to the deceased, to several of his patients, who had died under his hands; and to prove this statement he called several witnesses, of whom but one appeared. He, on the contrary, testified that he had been the prisoner's patient for an oppression at his stomach—that he had taken his emetic powders several times in three or four days, and was relieved from his complaint, which had not since returned. And there was no evidence in the cause, that the prisoner, in the course of his very novel practice, had experienced any fatal accident among his patients. The defence stated by the prisoner's counsel was, that he had for several years, and in different places, pursued his practice with much success; and that the death of the deceased was unexpected, and could not be imputed to him as a crime. But as the court were satisfied, that the

tice charged the jury: and the substance of his direction, and of several observations, which fell from the court during the trial, are for greater convenience here thrown together. As the testimony of the witnesses was not contradicted, nor their credit impeached, that testimony might be considered as containing the necessary facts on which the issue must be found. That the deceased lost his life by the unskilful treatment of the prisoner, did not seem to admit of any reasonable doubt: but of this point the jury were to judge. Before the Monday evening preceding the death of *Lovett*, he had by profuse sweats, and by often repeated doses of the emetic powder, been reduced very low. In this state, on that evening, other doses of this *Indian tobacco* were administered. When the second potion did not operate, probably because the tone of his stomach was destroyed, the repetition of them, that they might operate as a cathartic, was followed by convulsion fits, loss of reason, and death. But whether this treatment, by which the deceased lost his life, is or is not a felonious homicide, was the great question before the jury. To constitute the crime of murder, with which the prisoner is charged, the killing must have been with malice, either express or implied. There was no evidence to induce a belief that the prisoner, by this treatment, intended to kill or to injure the deceased; and the ground of express malice must fail. It has been said, that implied malice may be inferred from the rash and presumptuous conduct of the prisoner, in administering such violent medicines. Before implied malice can be inferred, the jury must be satisfied that the prisoner, by his treatment of his patient, was wilfully regardless of his social duty, being determined on mischief. But there is no part of the evidence, which proves that the prisoner intended by his practice any harm to the deceased. On the contrary, it appears that his intention was to cure him. The jury would consider whether the charge of murder was, on these principles, satisfactorily supported. But though innocent of the crime of murder, the prisoner may on this indictment be convicted of manslaughter, if the evidence be sufficient. And the solicitor general strongly urged, that the prisoner was guilty of manslaughter, because he rashly and presumptuously administered to the deceased a deleterious medicine, which in his hands, by reason of his gross ignorance, became a deadly poison. The prisoner's ignorance is in this case very apparent. On any other ground consistent with his innocence, it is not easy to conceive, that on the Monday evening before the death, when the second dose of his very powerful emetic had failed to operate, through the extreme weakness of the deceased, he could expect a repetition of these fatal poisons would prove a cathartic, and relieve the patient: or that he could mistake convulsion fits, symptomatic of approaching death, for a hypochondriac affection. But on considering this point, the court were all of opinion, notwithstanding this ignorance, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter. To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law, which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription. And it is not felony, if through his ig-

norance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient contrary to his expectation should die. The death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge, or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury, to be the effect of obstinate wilful rashness at the least, and not of an honest intention and expectation to cure. In the present case there is no evidence that the prisoner, either from his own experience, or from the information of others, had any knowledge of the fatal effects of the *Indian tobacco*, when injudiciously administered: but the only testimony produced to this point, proved that the patient found a cure from the medicine. The law thus stated, was conformable, not only to the general principles which governed in charges of felonious homicide, but also to the opinion of the learned and excellent lord chief justice *Hale*. He expressly states,¹ that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure, or prevent a disease, and contrary to the expectation of the physician, it kills him, he is not guilty of murder or manslaughter. If in this case it had appeared in evidence, as was stated by the solicitor general, that the prisoner had previously, by administering this *Indian tobacco*, experienced its injurious effects, in the death or bodily hurt of his patients, and that he afterwards administered it in the same form to the deceased, and he was killed by it, the court would have left it to the serious consideration of the jury, whether they would presume that the prisoner administered it from an honest intention to cure, or from obstinate rashness, and fool-hardy presumption, although he might not have intended any bodily harm to his patient. If the jury should have been of this latter opinion, it would have been reasonable to convict the prisoner of manslaughter at least. For it would not have been lawful for him again to administer a medicine, of which he had such fatal experience. It is to be exceedingly lamented, that people are so easily persuaded to put confidence in these itinerant quacks, and to trust their lives to strangers without knowledge or experience. If this astonishing infatuation should continue, and men are found to yield to the impudent pretensions of ignorant empiricism, there seems to be no adequate remedy by a criminal prosecution, without the interference of the legislature; if the quack, however weak and presumptuous, should prescribe, with honest intentions and expectations of relieving his patients.²

More recently, however, there has been a tendency to draw the line closer, and to hold a practitioner responsible, who acts without competent skill. Thus upon an indictment for manslaughter, by causing the death of a child by putting a plaster made of corrosive and dangerous ingredients upon its head, it appeared that the child for eighteen months had been afflicted with scald head, and was taken to the prisoner, who applied two plasters successively all over its head. Two surgeons proved there was a general sloughing of the

scalp, which caused the death, and in their opinion this might have been produced by the plasters; there was no evidence to show of what the plasters were composed. Bolland, B., said, "The law as I am bound to lay it down (and I believe I lay it down as it has been agreed upon by the judges; for cases of this kind have occurred of late more frequently than in former times) is this: if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity."¹

And so where the prisoner, a surgeon and man mid-wife, was charged with manslaughter upon an indictment, which alleged that he undertook the care and charge of B. K. as a man-midwife, and to do every thing needful for her during and after the time of her delivery, and that after B. K. was delivered he neglected to take proper care of and to render her proper assistance, by means whereof she died. Tindal, C. J., said to the jury, "You are to say whether, in the execution of that duty which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death of the person named in the indictment was caused thereby."²

And so in a case before Coleridge, J., where the learned judge told the jury, that the questions for them to decide were, whether the instrument had in this instance caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill, or gross want of attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution. If the jury thought that in this instance the prisoner had used the instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty.³

And the same just view was taken by Lord Lyndhurst, C. B., shortly afterwards, a qualification being very properly thrown in by which incompetency was not made responsible where the defendant's attendance was actually necessary. In this case the prisoner was indicted for manslaughter in causing the death of R. R., by administering to him a large quantity of Morrison's pill; the deceased, being ill of small-pox, had sent for the prisoner, who was a publican and agent for the sale of the pills, and under his advice had taken large quantities

¹ *R. v. Spiller*, 5 C. & P. 333, coram Bolland, B., and Bosanquet, J. See also *Lamphier v. Philpot*, 8 C. & P. 475, where Tindal, C. J., said: "Every person who enters into a learned profession, undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill."

² *Ferguson's case*, 1 Lew. 181. If this be the case stated in Long's Cases, the prisoner was a blacksmith, drunk, and wholly ignorant of the proper steps to be taken: no evidence is stated in Lewin. See 1 Russ. on Cr. 503-4.

³ *R. v. Spilling*, 2 M. & Rob. 107.

of them; his strength gradually wasted under their influence, and on the morning of his death, while in a state of collapse, the prisoner had, of his own accord, administered to him twenty pills. The prisoner had treated the deceased with great kindness during his illness, and on a former occasion the deceased had recovered from a dangerous illness while under the prisoner's treatment. Several medical men gave it as their opinion that medicine of the violent character, of which the pills were composed, could not be administered to a person in the state in which the deceased was, without accelerating his death. Lord Lyndhurst, C. B., said, "I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as a physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter."¹

An apothecary's apprentice who is guilty of negligence in delivering medicine, and death ensues in consequence, he is guilty of manslaughter. Upon an indictment for the manslaughter of a child, it appeared that the child being ill, the mother sent to a chemist for a pennyworth of paregoric; the chemist's apprentice delivered a phial, with a paregoric label on it, but with laudanum in it; and the mother, supposing it to be paregoric, gave the child six or seven drops, which killed it. The laudanum bottle and the paregoric bottle stood side by side. Bayley, J., to the jury:—"If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him."²

V.—MANUFACTURERS AND WORKMEN.

Carelessness on the part of persons employed in their ordinary business avocations, when resulting in death, is manslaughter.³ This principle applies both to manufacturers by whom defective material is used, or defective workmanship applied, and to workmen who are guilty of negligence in their application of such powers to practical use. Thus, where the prisoner, who was an iron-founder, was employed to make twelve cannons, to celebrate the passing of the Reform Bill, and four of them were sent home and tried, and one of them burst under the touch-hole, and was sent back to the prisoner, with orders to have it melted up; but the prisoner returned it nailed down to a carriage, and there was some lead in it, which must have been put there to stop up the part that had burst, as it matched the former aperture: and the cannon, being loaded not heavier than usual, burst, and thereby killed the deceased, it was held that the prisoner was guilty of manslaughter.⁴

The jury will be directed, however, to acquit if reasonable care

was shown. Thus, where the prisoner was indicted for manslaughter, in having, by negligence in the manner of slinging a cask, caused the same to fall and kill two females, who were passing along the causeway, it appeared that there were three modes of slinging casks customary in Liverpool: one by slings passed round each end of the cask; a second by can hooks; and a third in the manner in which the prisoner had slung the cask which caused the accident—namely, by a single rope round the centre of the cask. The cask was hoisted up to the fourth story of a warehouse, and, on being pulled endwise towards the door, it slipped from the rope as soon as it touched the floor of the room. Parke, J., in the course of his charge, told the jury:—"The double slings are undoubtedly the safest mode; but if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him."¹

Mere wantonness or sport, however, which results in death, makes the offender in like manner guilty. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in the mines in the neighbourhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C. J., said, "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act: if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."²

The distinction noticed in the above cases is pointedly illustrated by the familiar instance of workmen throwing rubbish from the roof. If this is done in the ordinary course of their business, and a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and if there was even a small probability of persons passing by, it will be manslaughter.³ It has, indeed, been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution used.⁴ But this must be understood with some limitation.

¹ Rigmardon's case, 1 Lew. 180.

³ 1 East, 262; Fost. 262.

² Fenton's case, 1 Lew. 179.

⁴ R. v. Hull, Kel. 40.

If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable: but when the streets are full, such ordinary caution will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it.¹

So also, where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide by misadventure.²

A person charged with the proper ventilation of a mine, will be guilty of manslaughter if through his negligence an accident occurs which results in death. In an English case, tried in 1847, the first count of the indictment stated, that the prisoner, in and upon one James Shakespeare did make an assault; and that it was the duty of the prisoner to ventilate and cause to be ventilated a certain coal mine, and to cause it to be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be kept ventilated, and that the noxious gases accumulated and exploded, whereby the said J. S., who was lawfully in the said mine, was killed. It appeared that a mine, called Round Green Colliery, situate at Hales Owen, was the property of George Parker, Esq., and that the prisoner was a sort of manager of it, and called the ground bailiff; that another person was under him, called the butty, he being a sort of foreman, and that the deceased, who was called the doggy, was a kind of second foreman under the butty. It further appeared, that, at about half-past six o'clock on the morning of the 17th of November, 1846, a number of men were working in a large chamber in the colliery, when there was an explosion of fire-damp, by which nineteen persons, including the deceased James Shakespeare, were killed; and it was imputed, on the part of the prosecution, that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. But it was sought to be shown by the cross-examination of the witnesses for the prosecution, that it was the duty of the butty (who was one of the persons killed by the explosion) to have reported to the prisoner as ground bailiff that an air-heading was required; and that as far as appeared, he had not done so. For the prisoner it was submitted, first, that the prisoner was not guilty of any negligence at all, as it was only his duty to cause air-headings to be put up on the requisition of the butty; and, secondly, that a person who was guilty only of breach of duty by omission, could not be found guilty of manslaughter; for that, in order to constitute that offence, there must be some wrongful or improper act done by the prisoner, except in those cases where there was a liability known to the law, such as providing an infant with food, or the like. MAULE, J. (in summing up.)—The prisoner is charged with manslaughter, and it is imputed, that in consequence of his omission to do his duty, a person named Shakespeare lost his life. It appears that the prisoner acted as ground bailiff of a mine, and that, as such, his duty was to regulate the ventilation, and direct where air-headings should be placed; and the questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasona-

ble and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect. Still, assuming that to be so, their neglect will not excuse the prisoner; for, if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who is negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them.¹

VI.—PRIZE FIGHTERS, AND PERSONS ENGAGED IN ATHLETIC SPORTS.

On the same principle that parties engaged in a duel are guilty of *murder* if death ensue, so persons engaged in prize fighting with the same result, are guilty of manslaughter. The difference between the cases is simply that of *intent*. In the first instance, there is an intent to take life; in the second, an intent merely to do an unlawful act not amounting to felony. But if, in prize fighting, a party goes out with an original intent to do grievous bodily harm to his antagonist, and slays him, the offence is murder at common law, or murder in the second degree under the American statutes. And so if he goes with the intention to *kill*, no matter what may have been the *motive*, the offence is murder. If, however, the guilty intent arises in hot blood, in the excitement of the struggle, and without the intervention of cooling time, the offence is but manslaughter. Under ordinary circumstances, all persons encouraging a prize fight in which death ensues, are accessaries to manslaughter. Thus, where it appeared that there was a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence, and the deceased died in consequence of blows received on this occasion, and for the prisoner it was attempted to be proved, that though he was present during the fight, yet he neither did nor said any thing. Littledale, J., said, "If the prisoner was at this fight encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it. My attention has been called to the evidence of those witnesses who have said that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence; I mean if they remained present during the fight. I say that if they were not casually passing by, but staying at the place, they encouraged it by their presence, although they did not say or do any thing. This is my opinion of the law of this case. However, you ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself; for if he came by his death by any means not connected with the fight itself, that is, if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of

¹ R. v. Haines. 2 Car. & Kir, 368, 369.

the combatants, then persons merely present encouraging the fight would not be answerable, unless they are connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the fight itself, that is by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter."¹

The general principle is, that prize-fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, involve a criminal responsibility.² In such cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained: and meetings of this kind have also a strong tendency in their nature to a breach of the peace.³ Thus, in a case of old date, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden.⁴

Death occurring in any unlawful sport involves those concerned in manslaughter. Thus, the English custom of cock-throwing, at shrovetide, has been considered unlawful and dangerous; and accordingly, where a person throwing at a cock missed his aim, and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and, speaking of the custom, he says, "It is a barbarous unmanly custom, frequently productive of great disorders, dangerous to the bystanders, and ought to be discouraged."⁵ So, throwing stones at another wantonly in play, being a dangerous sport, without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter.⁶

Though the sport be not in itself unlawful, yet if the weapons used are of a dangerous and unsuitable character, and are employed with recklessness which leads to death, the offender, in case of death, is guilty of manslaughter. Thus, in an early English case, the evidence was, that Sir John Chichester made a pass at the servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword.⁷ This was adjudged manslaughter: and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm.⁸ But, notwithstanding these high au-

¹ *R. v. Murphy*, 6 C. & P. 103; *R. v. Young*, 8 C. & P. 844.

² *Fost. 260*

³ *1 Fost. P. C. 5 - 43 - 370*

thorities, it may now be questioned whether, in this case, the application of the principle is as correct as the principle itself. If the practising of this kind in fencing—which was the sport in which Sir John Chichester was engaged—is lawful, it would seem that the bursting of the sword through the chape of the scabbard was mere misadventure. The design of the scabbard is to render the sword harmless, and a man who carries his sword about his person, assuredly gives the best evidence in his power of his confidence in the sufficiency of the guard. If it is lawful to carry such a weapon, it assuredly is lawful to use it when properly guarded from mischief. The whole question, therefore, turns on the point, whether the particular exercise in which Sir John Chichester was engaged, was one likely to disengage the sword from the scabbard.

All sports calculated to produce public mischief, riot or disorder, are unlawful; and if death ensue, in the pursuit of them, the party killing is guilty of manslaughter:¹ while all such exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are considered lawful.²

VII.—PERSONS FROM MISCHIEF OR OTHER COLLATERAL UNLAWFUL PURPOSE
DOING BODILY HARM.

As has been considered on another occasion,³ there are many cases in which death is the result of an occurrence in itself unexpected, but which arose from negligence or inattention. How far, in such cases, the agent of such misfortune is to be held responsible, depends upon the inquiry whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes; and the degree of caution requisite to bring the case within the limits of misadventure must be proportioned to the probability of danger attending the act immediately conducive to the death. Where deer had entered a corn-field, and were beating down the corn, the owner went with his servant to watch at night with a gun, and charged him to fire when he heard anything rush into the standing corn; and upon the owner rushing into the corn in another part of the field, the servant fired and killed him. In the first passage wherein Lord Hale mentions this case, he seems to think that it amounted to manslaughter, for want of due diligence and care in the servant in shooting upon such a token as might befall a man as well as a deer: however, he says, it was a question of great difficulty. But in a subsequent part of his work, as is noticed by Mr. East, the learned author relating the same case, which had been determined by himself at Peterborough, says, that he had ruled it only to be misadventure; for the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. But it seemed to him, that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter; because of the want of due caution in the servant to shoot before he discovered his mark.

As has been just seen,⁴ if a man, knowing that people are passing

¹ *Fost.* 259, 260; 1 *East*, P. C. c. 5, s. 41, p. 368.

³ *Wh. Cr. Law*, (2d ed.) 882.

² *Ante*, p. 36, 37.

⁴ *Ante*, 145, 146.

along the streets, throw a stone or shoot an arrow over a house or wall, and a person be thereby killed, this will be manslaughter, though there were no intent to do hurt to any one, because the act itself was unlawful. So where a gentleman came to town in a chaise, and, before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper.¹

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and therefore if a by-stander be killed by the shot, such killing will be manslaughter.²

It has been already observed, and it will be noticed more fully when the distinction between murder in the first and murder in the second degree is considered, that where death ensues from an act done in the prosecution of a felonious intention, it will be murder: but where the intent was to commit bare trespass, if death ensues from such act, the offence will be only manslaughter.³ Thus, though if A shoot at the poultry of B, intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter.⁴ And so where death ensues from injury inflicted by one upon another, it is murder or manslaughter, according as the circumstances or the nature of the instrument used, and the manner of using it, are calculated to produce great bodily harm or not.⁵ Thus where a carman was in the front part of a cart, loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the cart, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received, it was held that as the intent was to commit a mere trespass, the boy was guilty of manslaughter.⁶ On the other hand, forcing a person to do an act which is likely to produce his death, and which does produce it, is murder; and threats may constitute such force. The indictment charged first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and, thirdly and fourthly, that he beat her and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall, died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall: but Heath, J., Gibbs, J., and Bayley, J., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if

he had thrown her out of the window himself. The prisoner however was acquitted; the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats.¹ And so it was held that where the prisoner assaulted and struck him with a stick, and that the deceased, from a well grounded apprehension of a further attack, which would have endangered his life, spurred his horse, whereby it became frightened, and threw the deceased, &c., and it was proved that the prisoner struck the deceased with a small stick, and that he rode away, the prisoner riding after him, and on the deceased spurring his horse, it winced and threw him; it was held on the authority of the preceding case, that the case was proved.²

Where there is a party combination to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, the persons so engaged, if they happen to kill any one in the prosecution of this unlawful purpose, will be guilty of murder. Yet, in one case, where divers rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others, was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of manslaughter. It is said, that perhaps it was so adjudged for this reason, that the person slain was so much in fault himself.³

When a man lays poison to kill rats, and another man takes it, and it kills him, if the poison was laid in such a manner and place as to be mistaken for food, it is, perhaps, manslaughter, if otherwise, misadventure only.⁴

Where liquor is knowingly administered in large quantities for unlawful purposes, and death ensues, it is manslaughter, provided the purpose is not to do grievous bodily harm, or to commit a felony, in which latter case the offence is murder. Thus, where an indictment for manslaughter stated that the prisoners gave, administered, and delivered to M. A. divers large and excessive quantities of wine and porter, and induced, procured, and persuaded M. A. to take, drink, and swallow the said quantities of spirituous liquors; the same being likely to cause and procure his death, and which the prisoners then and there well knew; and that M. A., by means of the said inducement, procurement, and persuasion took, drank, and swallowed the said large quantities of spirituous liquors; by means whereof he became greatly drunk, &c., and whilst he was so drunk as aforesaid, the prisoners made an assault on him and forced and compelled him to go, and put, placed, and confined him in a cabriolet and drove and carried him about therein for a long time, and thereby shook, threw, pulled, and knocked about M. A., by means whereof M. A. became mortally sick; of which said large quantities of spirituous liquors, and of the drunkenness occasioned thereby, and of the said shaking, &c., and the sickness occasioned thereby, M. A. died. It appeared that the deceased was in possession of the goods of one of

¹ R. v. Evans, MSS., 1 Russ. on Cr. 489.

² 1 Hawk. P. C. c. 31, s. 53.

³ R. v. Hickman, 5 C. & P. 151.

⁴ 1 Hale, 431.

the prisoners under a warrant from the sheriff, and the three prisoners plied him with drink, themselves drinking freely also, and when he was very drunk, put him into a cabriolet, and caused him to be driven about the streets, and about two hours after he was put in the cabriolet he was found dead. Parke, B., after directing the jury to dismiss from their consideration that part of the indictment which alleged that the prisoners knew that the quantity of liquor taken was likely to cause death, of which there did not appear to be any evidence, and which, if proved, would make the offence approach to murder, told the jury that if they were of opinion that the prisoners put the deceased in the cabriolet, then the questions would be: first, whether they or any of them were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose; or, whether, when he had taken it, they put him in the cabriolet for an unlawful purpose. If they thought that the three prisoners, or one of them, made him excessively drunk, to enable the prisoner, whose goods were seized, to prevent the completion of the execution; or if they were satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, was not an unlawful act; or, if death ensued, an offence that could be construed into manslaughter. Upon the first question stated, it would be essential to make out that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house; and if that were doubtful, still if, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case would be a case of manslaughter. If, however, they all got drunk together, and afterwards he was put into the cabriolet with the intention that he should take a drive only, that was not an unlawful object, such as had been described, and the prisoners would be entitled to an acquittal. And to a question put by the jury, the learned baron answered, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter.¹ Upon the same reasoning rest the cases which have already been noticed under another head, where spirituous liquors, or opiates are given to a child, either from wantonness or with the intent to produce artificial quiet, in which the offence, if death ensue, is manslaughter.²

¹ *R. v. Packard*, 1 C. & Mars. 236.

² *R. v. Martin*, 3 C. & P. 211; *Ann v. State*, 11 Hump. 159. See *Ante*, 124.

CHAPTER VIII.

PRINCIPALS AND ACCESSARIES IN HOMICIDE.

STATUTES.

UNITED STATES.

"That every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising, the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be accessory to such piracies before the fact; and every such person, being thereof convicted, shall suffer death."—(Act of April 30, 1790, s. 10.)

"That after any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain or conceal, any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels, which have been, by any such pirate or robber, piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged, to be accessory to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars."—(Ibid. sect. 11.)

MASSACHUSETTS.

Every person, who shall be aiding in the commission of any offence, which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, or who shall be accessory thereto before the fact, by counselling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner, which is or which shall be prescribed for the punishment of the principal felon.—(Rev. Stat. chap. 133, sect. 1.)

Every person, who shall counsel, hire, or otherwise procure any offence to be committed, which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last mentioned case, may be punished in the same manner as if convicted of being an accessory before the fact.—(Ibid. sect. 2.)¹

Any person, charged with the offence mentioned in the preceding section, may be indicted, tried and punished in the same court and the same county, where the principal felon might be indicted and tried, although the offence of counselling, hiring, or procuring the commission of such felony may have been committed on the high seas, or on land, either within or without the limits of this state.—(Rev. Stat. chap. 133, sect. 3.)

Every person, not standing in the relation of husband or wife, parent or grandparent, child or grand-child, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbour, conceal, main-

¹ It was said by the Supreme Court, that Stat. 1784, c. 65, from which the above section was drawn, providing that if any person shall aid, assist, &c., any person to commit murder, he shall be considered as an accessory before the fact, refers to a person not *present*, aiding, &c. If the party be in such a situation as to be able to afford assistance to the principal, although not literally present, he will be a principal. Com. v. Knapp, 9 Pick. 496.

tain or assist any principal felon, or accessory before the fact, or shall give such offender any other aid, knowing that he had committed a felony, or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial or punishment, shall be deemed accessory after the fact, and shall be punished by imprisonment in the state prison, not more than seven years, or in the county jail, not more than three years, or by fine not exceeding one thousand dollars.—(Ibid. sect. 4.)

Every person, who shall become an accessory after the fact, to any felony either at common law, or by any statute now made, or which shall hereafter be made, may be indicted, convicted, and punished, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice, by any court having jurisdiction to try the principal felon, and either in the county, where such person shall have become an accessory, or in the county where such principal felony shall have been committed.—(Ibid. sect. 5.)

NEW YORK.

Every person, who shall be a principal in the second degree, in the commission of any felony, or who shall be an accessory to a murder, before the fact, and every person who shall be an accessory to any felony, before the fact, shall, upon conviction, be punished in the same manner herein prescribed, with respect to principals in the first degree.—(2 R. Stat. 698, sect. 6, 1st edition.)

Every person, who shall be convicted of having concealed any offender after the commission of any felony, or of having given such offender any other aid, knowing that he has committed a felony, with intent and in order that he may avoid, or escape from, arrest or trial, or conviction, or punishment, and no others, shall be deemed an accessory after the fact, and upon conviction shall be punished by imprisonment in a state prison, not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(Ibid. sect. 7.)

An indictment against an accessory to any felony, may be found in the county where the offence of such accessory shall have been committed, notwithstanding the principal offence was committed in another county; and the like proceedings shall be had thereon in all respects, as if the principal offence had been committed in the same county.—(Ibid. 727, sect. 48.)

An accessory, before or after the fact, may be indicted, tried, convicted and punished, notwithstanding the principal felon may have been pardoned, or otherwise discharged, after his conviction.—(Ibid. sect. 49.)

Every person who shall be convicted of having been an accessory after the fact to any kidnapping or confinement, herein before prohibited, shall be punished by imprisonment in a state prison, not exceeding six years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(Ibid. p. 665, sect. 31.)

PENNSYLVANIA.

"Where any murder or felony hath been, or hereafter shall be committed in one county of this province, and one or more persons shall be accessory or accessories to any such murder or felony in another county, then an indictment found or taken against such accessory or accessories, upon the circumstances of such matter, before justices of the peace, or other justices or commissioners, to inquire of felonies in the county where such offences of accessory or accessories, in any manner, have been or shall be committed or done, shall be as good and effectual in law as if the said principal offence had been committed or done within the same county where the indictment against such accessory hath been or shall be found.—(Act of 31st May, 1718, sect. 22: 1 Smith, 405; 6th ed. Purdon, 156.)

The justices of the said Supreme Court, or two of them, upon suit to them made, shall write to the keepers of the records, where such principal is or shall hereafter be attainted or convicted, to certify them whether such principal be attainted, convicted or otherwise discharged of such principal felony; who, upon such writing to them or any of them directed, shall make sufficient certificate in writing, under their seal or seals, to the said justices, whether such principal be attainted, convicted, or otherwise discharged or not. And after they who so have the custody of records, do certify that such principal is attainted, convicted or otherwise discharged of such offence by the law, then the justices of jail delivery or of oyer and terminer shall proceed upon every such accessory in the county where

he or they became accessory, in such manner and form as if both the said principal offence and accessory had been committed and done in the same county, where the offence or accessory was or shall be committed or done. And every such accessory and other offenders as above expressed, shall answer upon their arraignments, and receive such trial, judgment, order and execution, and suffer such forfeiture, pains and penalties, as is used in other cases of felony, and as the statute made in the second and third years of the reign of king Edward the Sixth, (chap. 24,) entitled "An Act for the trial of murders and felonies committed in several counties," doth direct in such cases; which statute shall be observed in this province, any law or usage to the contrary notwithstanding."—(Ibid. sect. 23.)

Every person convicted of bigamy, or being an accessory after the fact, in any felony, or of receiving stolen goods, knowing them to have been stolen, or of any other offence not capital, for which, by the laws in force, before the act, entitled, "An Act to amend the penal laws of this state," burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping or imprisonment for life, is or may be inflicted, shall, instead of such parts of the punishment, be fined and sentenced to undergo in the like manner, and be confined, kept to hard labour, fed and clothed as is hereinafter directed, for any term not exceeding two years, which the court before whom such conviction shall be, may and shall, in their discretion, think adapted to the nature and heinousness of the offence.—(Act 5th April, 1790; 2 Dallas, 801; 2 Smith, p. 531; 6th ed. Pur. 859, sect. 4.)

VIRGINIA.

An accessory to a murder or a felony committed, shall be examined by the court of that county or corporation, and tried by the court in that district where he became accessory, and shall answer upon his arraignment, and receive such judgments, order, execution, pains and penalties as are used in other cases of murder and felony.—(R. L. vol. i. 104.)

If any be accused of an act done as principal, they that be accused as accessory shall be attached also, and safely kept in custody until the principal be attainted or delivered.—(R. L. vol. i. 126.)

Persons knowingly harbouring horse-stealers, or receiving from them stolen horses, are to be deemed and punished as accessories. And if the principal felon cannot be taken so as to be prosecuted and convicted of such offence, nevertheless the accessory may be punished as for a misdemeanor, although the principal felon be not before convicted of the felony, which shall exempt the offender from being punished as accessory, if the principal offender shall afterwards be taken and convicted.—(R. L. vol. i. 179.)

If any principal offenders shall be convicted of any felony, or shall stand mute, or shall peremptorily challenge above twenty persons returned to be of the jury, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if the principal felon had been attainted thereof, notwithstanding such principal shall be admitted to the benefit of his clergy, pardoned or otherwise delivered before his attainer; such accessory to suffer the same punishment as the principal if he had been attainted.—(R. L. vol. i. p. 206.)

Principals in the first degree.

A principal in the first degree is, one who is the actor or actual perpetrator of the fact.¹ But it is not necessary that he should be actually present when the offence is consummated; for, if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree.² It is not therefore necessary, to make a man principal, that the felony in question should have been consummated with his own hands. If he acts through the medium of an innocent³ or insane medium, he is guilty as principal in the first degree.⁴ Thus, in Sir

¹ 1 Hale, 233, 615.

² Vaux's case, 4 Co. 44 b.; Fost. 349; R. v. Harley, 4 C. & P. 369; 4 Cranch, 492.

³ R. v. Clifford, 2 Car. & Kir. 201.

⁴ 1 Hale, 19; 4 Bla. Com. 23; R. v. Giles, 1 Moody, C. C. 166.

William Courtenay's case, Lord Denman, C. J., charged the jury, "You will say whether you find that Courtenay was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and concurring in his acts; and if you do, you will find them guilty, for they are then liable as principals for what was done by his hand."¹ If the principal were insane when the act was committed, no one could be convicted as an aider or abettor.² If a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the fact was committed, is *ex necessitate*, liable for the act of his agent, and a principal in the first degree.³ So if A, by letter, desire B, an innocent agent, to write the name of "W. S." to a receipt on a post-office order, and the innocent agent do it, believing that he is authorized so to do, A is a principal in this forgery, and it makes no difference that by the letter, A says to B, that he is "at liberty" to sign the name of W. S., and does not in express words direct him to do so. But if A, before the date of the letter sent to B, received by post a letter of an earlier date, purporting to have come from W. S., and bearing postmarks of earlier date, from which it may be inferred that he was authorized to make use of the name of W. S., the counsel of A, on his trial for the forgery, is entitled to state the contents of that letter, and to give it in evidence, with a view of showing that A bona fide believed that he had the authority of W. S. for directing B to sign the name of W. S. to the receipt.⁴ But, if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact.⁵ All who are present, aiding and abetting him who inflicts the mortal blow, in cases of murder, are principals and criminals in the highest degree; but it is not every intermeddling in a quarrel or affray from which death ensues, that constitutes an aiding and abetting to the murder. If, for instance, two men fight on a former grudge and of settled malice, and with intent to kill, of which the spectators are innocent, and they of a sudden take sides with the combatants and encourage them by words, and death ensue, it will not be murder in such persons.⁶

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder, another of manslaughter; for if there be no malice in the party striking, but malice in the abettor, it will be murder in the latter, though only manslaughter in the former. So if A assault B of malice, and they fight, and A's servant come in aid of his master, and B be killed, A is guilty of murder; but the servant, if he knew not of A's malice, is guilty of

¹ R. v. Mears, 1 Boston Law Rep. 205; Hawk. c. 1, s. 7.

² R. v. Taylor, 8 Car. & P. 616.

³ Fost. 340; 1 East, P. C. 118; 1 Hawk. c. 31, s. 7; R. v. Palmer, 1 N. R. 96; 2 Leach, 978; Com. v. Hill, 11 Mass. 136.

⁴ R. v. Clifford, 2 Car. & Kir. 201.

⁵ R. v. Stewart, R. & R. 363; or, if he be present, a principal in the second degree, Fost. 349.

⁶ State v. King et al., 2 Rice's S. C. Digest, 106.

manslaughter only.¹ Several persons conspired to kill Dr. Ellis, and they set upon him accordingly, when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis: but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter, and three others of murder, and the three were executed.²

One indicted as principal cannot be convicted on proof showing him to be only an accessory before the fact.³

Principals in the second degree.

Principals in the second degree are those who are present aiding and abetting at the commission of the fact. To constitute principals in the second degree there must be, in the first place, a participation in the act committed; and in the second place, presence either actual or constructive at the time of its commission. Although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon.⁴ It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions, in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting.⁵

If a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless the other do acts himself, which render him liable as principal.⁶

Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree. But the act must also be the result of the confederacy; and if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act.⁷

If A is charged with the offence, and B is charged with aiding and abetting him, it is essential to make out the charge as to B, that B should have been aware of A's intention to commit murder.⁸

In the case of murder by duelling, in strictness, both the seconds are principals in the second degree; yet Lord Hale considers that,

¹ 1 Hale, 446.

³ Hughes v. State, 12 Ala. 458.

⁴ Jerv. Arch. 4.

⁷ R. v. White, Russ. & R. C. C. 99.

² R. v. Salisbury, Plowd. 97.

⁴ 1 Hale, 439; Fost. 350.

⁶ The U. S. v. Libby, 1 W. & M. 221.

⁸ R. v. Cruise, 8 C. & P. 541.

as far as relates to the second of the party killed, the rule of law in this respect, has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree.¹ But all persons present at a prize-fight, having gone thither for the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace.²

If one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either.³ Whether the advice of the defendant was the *operative* cause of the suicide, is, it seems, immaterial. Thus, in an early case in Massachusetts.⁴ It was said by Parker, C. J., in charging the jury, "The important fact to be inquired into is, whether the prisoner was instrumental in the death of *Jewett*, (the deceased,) by advice or otherwise. The government is not bound to prove that *Jewett* would not have hung himself had *Bowen's* counsel never reached his ear. The very act of advising to the commission of a crime is, in itself, unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise: as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given."

There must be presence, either actual or constructive, at the time of the commission of the offence. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house, watching to prevent surprise, or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient to make him a principal in the second degree.⁵ One who keeps guard while others act, assisting them, is, in the eyes of the law, present and responsible, as if actually present.⁶

A person, however, is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so if necessary.⁷

Persons not sufficiently near to give assistance, are not principals. Thus, where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return,

¹ 1 Hale, 422, 452.

² R. v. Perkins, 4 C. & P. 537; R. v. Murphy, 6 C. & P. 103; R. v. Young, 8 C. & P. 645.

³ R. v. Dyson, Russ. & R. C. C. 523; R. v. Russell, Moody, C. C. 366; R. v. Alison, 8 C. & P. 418. See ante, p. 98, 99.

⁴ Com. v. Bowen, 13 Mass. 359; see ante, p. 98, 99; and see Wharton's Preced. 37—46.

⁵ Foster, 347, 350; see R. v. Borthwick et al., 1 Doug. 207; 1 Leach, 66; 2 Hawk. c. 29, s. 7, 8; 1 Russ. 31; 1 Hale, 555; R. v. Gogerly et al., R. & R. 343; R. v. Owen, 1 Mood. C. C. 96; Com. v. Knapp, 9 Pick. 490; State v. Harden, 2 Dev. & Bat. 407; State v. Coleman, 5 Porter, 32.

⁶ State v. Town, Wright's Ohio R. 75.

⁷ United States v. Burr, 4 Cranch, 492.

when he passed the note, and divide the produce. The three had before been concerned in uttering another forged note; but at the time this note was uttering in Portsmouth, the other two stayed at Gosport. The jury found all three guilty, but, on a case reserved, the judges were clear, that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and, therefore, they were recommended for a pardon.¹ Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he were at such a distance at the time of the felonious taking as not to be able to assist in it.² And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessaries before the fact.³ Presence, however, during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.⁴

All those who assemble themselves together, with an intent even to commit a trespass, the execution whereof causes a felony to be committed; and continue together, abetting one another, till they have actually put their design into execution; and also all those who are present when felony is committed, and abet the doing of it, are principals in felony.⁵ So if several persons come to a house with intent to commit an affray, and one be killed, while the rest are engaged in riotous or illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder.⁶ And where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers; and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though, at the time of the fact, some of them were at such a distance as to be out of view.⁷ Thus where a number of persons combine to seize with force and violence a vessel, and run away with her, and, if necessary, to kill any person who should oppose them in the design, and murder ensues, all concerned are principals in such murder.⁸ So, to use the language of an able judge, where divers persons resolve generally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and, in doing so, happen to kill a man, they are all guilty of murder, for they who unlawfully engage in such bold disturbances of the public peace, in

¹ *R. v. Soares, Atkinson & Brighton*, 2 East, P. C. 974; *Russ. & Ry. C. C.* 25, S. C.; and see *R. v. Stewart et al.*, *Russ. & R. C. C.* 363; *R. v. Badcock et al.*, *Russ. & R. C. C.* 249; *R. v. Manners*, 7 C. & P. 801.

² *R. v. Kelley*, R. & R. 421.

³ *R. v. Soares*, R. & R. 25; *R. v. Davis*, Id. 113; *R. v. Elsee*, Id. 142; *R. v. Badcock*, Id. 249; *R. v. Manners*, 7 C. & P. 801.

⁴ *R. v. Bingley*, R. & R. 446; see 2 East, P. C. 768.

⁵ *Fost.* 351, 352; 2 *Hawk. c.* 29, s. 9; *R. v. Howell*, 2 C. & P. 437.

⁶ *Dalton*, J., c. 161; 1 *Hale*, 439; *Hawk. b.* 2, c. 29, s. 8.

⁷ *R. v. Howell*, 9 C. & P. 437.

⁸ 1 *Gallison*, 624.

opposition to, and in defiance of, the justice of the nation, must, at their peril, abide the event of their actions. Malice, in such a killing, is implied by the law, in all who were engaged in the unlawful enterprise; whether the deceased fell by the hand of the accused in particular, or otherwise, is immaterial. All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but has been found necessary to prevent riotous combinations committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of the homicide. Where, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no connexion with the common object, the responsibility for such homicides attaches exclusively to its actual perpetrators.¹

If, as it was laid down in a case which will be the subject of a fuller discussion hereafter, during a scene of unlawful violence, an innocent third person is slain, who had no connexion with the combatants on either side, nor any participation in their unlawful doings, such a homicide would be murder, at common law, in all the parties engaged in the affray. It would be a homicide, the consequence of an unlawful act, and all participants in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated, in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms between two bodies of enraged men should take place in a public street, and, from a simultaneous fire, innocent persons, their wives or children in their houses, should be killed by some of the missiles discharged—shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the public highway of a thickly populated city, are they to have the benefits of impracticable niceties, in order to their indemnity from the consequences of their own conduct?²

The distinction between principals in the first and second degree it has been said, is a distinction without a difference; and, therefore it need not be made in indictments.³ Such is only the case, however, where the punishment is the same for the two divisions.⁴ But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors.⁵ In an indictment for murder, if several be charged as principals, one

¹ *Com. v. Daley*, 4 Penn. Law Journ. 156, by King, President.

² *Com. v. Hare*, 4 Penn. Law Journ. 259.

³ *State v. Fley*, 25 Brevard, 338; *State v. Green*, 4 Strobbart, 128.

⁴ 2 Hawk. c. 25, s. 64; *Mackally's case*, 9 Co. 67 b.; *Fost.* 345.

⁵ 1 East, P. C. 348, 350; *R. v. Home*, 1 Leach, 473.

as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present, is, in contemplation of law, the injury of each and every of them.¹ There are cases, however, where the provisions of a statute require the distinction to be observed; thus an indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, &c., is to be understood as charging that he caused it to be done in his presence, and that he aided, being present; in other words, as charging him as principal in the second degree, and not as accessory.²

If the actual perpetrator of a murder should escape by flight, or die, those present abetting the commission of the crime, may be indicted as principals; and though the indictment should state the mortal injury was committed by him who is absent, or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient.³ By the ancient law, principals in the second degree could not be tried until the principal had been convicted and outlawed.⁴ Such, however, is no longer the case, and the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted.⁵

Thus Chief Justice Holt says, "though the indictment be against the prisoner for aiding, assisting, and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder."⁶ And though anciently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessaries; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the second degree.⁷ So that if A be indicted for murder, or manslaughter, and C and D for being present aiding and assisting A, and A appears not, but C and D appear, they shall be arraigned; and if convicted shall receive judgment, though A neither appear nor be outlawed.⁸ And if A be indicted as having given the mortal stroke, and B and C as present, aiding and assisting, and upon the evidence it appears that B gave the stroke, and A and C were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all; for it is only a variation of circumstance;

¹ *State v. Mair*, 1 Coxe's R. 453; *Foster*, 551; *State v. Fley & Rochelle*, 2 Brevard, 338; *R. v. Borthwick*, Doug. 207; 1 East, P. C. 350.

² See *Rasnicks's case*, 2 Virg. Ca. 356; *Huffman v. Com.* 9 Randolph, 685.

³ *State v. Fley & Rochelle*, 2 Rice's S. C. Digest, 104; 2 Brevard, 338.

⁴ *Foster*, 347.

⁵ *R. v. Taylor*, 1 Leach, 360; *Benson v. Offley*, 2 Shaw, 570; 3 Mod. 121; *R. v. Wallis*, Salk. 334; *R. v. Towle*, R. & R. 314; 3 Price, 145; 2 Marsh, 465; *Archbold's C. P.* 6.

⁶ *R. v. Wallis et al.*, Salk. 334. This point was doubted by some of the judges, in *Taylor and Shaw's case*, 1 Leach, 360; 1 East, P. C. c. 5, s. 121, p. 351; but a majority of them thought the conviction proper. No express determination, however, was made in the last case, as it was thought by the judge who tried the prisoner a proper case for a pardon, on the special circumstances.

⁷ 1 Hale, 437; *Plow. Com.* 100, u. ⁸ 1 Hale, 437; *Plow. Com.* 97, 100; *Gythyn's case*.

the law being that the stroke of the one is the stroke of all who were present.¹ It is competent for the prosecution, on a trial of a principal in the second degree, to offer in evidence an admission of guilty by the principal in the first degree, in addition to the record of the latter's conviction.

Accessaries before the Fact.²

An accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, or abet another to commit such felony.³ The meaning of the word "command" is, where a person having control over another, as a master over a servant, orders a thing to be done.⁴ To constitute a man accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal.⁵ The accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A command B to beat C, and he beat C, and he beat him so that he dies, A is accessory to the murder.⁶ So, if A command B to burn the house of C, and in doing so the house of D is also burnt, A is accessory to the burning of D's house.⁷ And so if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A, and instead of poisoning him he shoot him, J. W. is, nevertheless, liable as accessory.⁸ If procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act.⁹ The procurement need not be direct; it is sufficient if one or more persons become the medium through whom the work is done;¹⁰ it may be either by direct means, as by hire, counsel, or command; or indirect, by evincing an express liking, approbation, or assent to another's felonious design.¹¹

The concealment of the knowledge that a felony is to be committed, will not make the party concealing accessory before the fact;¹² nor

¹ R. v. Mackally, 1 East, 350; 9 Co. 98, (a.); 1 Hale, 438.

² For indictments under this head, see Wharton's Precedents, as follows: Against accessory before the fact, together with the principal, 32. Against an accessory before the fact, the principal being convicted, 34. Against accessory after the fact, with the principal, 35. Against accessory after the fact, the principal having been convicted, 35. Against accessory before the fact generally, in Massachusetts, 35. Against accessory before the fact, in murder, at common law, 36. Against accessory before the fact, in murder, in Massachusetts, 36. Against an accessory for harbouring a principal felon in murder, 36. Against an accessory to burglary after the fact, 37. Against principal and accessories before the fact in same, 37. Against accessory before the fact to suicide: First count, against suicide as principal in the first degree, and against party aiding him as principal in the second degree, 37; Second count, against defendant for murdering suicide, 38—66. Against a defendant in murder, who is an accessory before the fact in one county to a murder committed in another, 39. See, for other forms of accessories to murder, &c., "*Homicide*." Against principal and accessory before the fact, in larceny, 40. Against accessory for receiving stolen goods, 40. Against accessory for receiving principal felon, 41. Against accessory to piracy before the fact, 618. Against accessory to piracy after the fact, 619.

³ 1 Hale, 615.

⁴ State v. Mann, 1 Haywood's N. C. R. 4.

⁵ 1 Hale, 615; R. v. Gordon, 1 Leach, 515; 1 East, P. C. 352.

⁶ 4 Bl. Com. 37; 1 Hale, 617.

⁷ R. v. Saunders, Plowd. 475.

⁸ Fost. 369, 370.

⁹ R. v. Cooper, 5 C. & P. 535.

¹⁰ Fost. 125; R. v. Somerset, 19 St. Trials, 804; R. v. Cooper, 5 C. & P. 535.

¹¹ 2 Hawk. c. 29, s. 11; People v. Norton, 8 Cowen, 137.

¹² 2 Hawk. c. 29, s. 23.

will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence.¹ The procurement must continue till the consummation of the offence; for if the procurer of a felony repent, and, before the felony is committed, actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessory.² So, if the accessory order or advise one crime, and the principal intentionally commit another: as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A, instead of so doing he commit the same crime against B—the accessory will not be answerable;³ but, if the principal commit the same offence against B by mistake, instead of A, it seems it would be otherwise.⁴

If the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus, if A persuade B to poison C, and B accordingly give poison to C, who eats part of it, and gives the rest to D, who is killed by it, A is guilty of a great misdemeanor only in respect of D, but is not an accessory to his murder: because it was not the direct and immediate effect of the act done in pursuance of the command.⁴ And if A counsel or command B to beat C with a small wand or rod, which would not in all human reason cause death, and B beat C with a great club, or wound him with a sword, whereof he dies, it seems that A is not accessory; because there was no command of death, nor of any thing that could probably cause death; and B departed from the command in substance, and not in circumstance.⁵ But if the crime committed be the same in substance with that which was commanded, and vary only in some circumstantial matters; as where a man advises another to kill a person in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs or shoots him; the person giving such command is still accessory to the murder; for the substance of the thing commanded was the death of the party killed, and the manner of its execution is a mere collateral circumstance.⁶

At common law, the conviction of some one who has committed the crime must precede that of one guilty only as accessory. A prisoner does not waive his right to call for the record of such conviction, by pleading.⁷ The same rule has been laid down in Massachusetts.⁸ In North Carolina, the principle has been somewhat expanded, it having been there held that the accessory is not liable to be tried while the principal is amenable to the laws of the state, and is still unconvicted,⁹ though in that state the conviction of the principal is not admissible evidence, until judgment has been rendered on the verdict.¹⁰ In

¹ 1 Hale, 616.

² 1 Hale, 618.

³ 1 Hale, 617.

⁴ Fost. 370, *et seq.*; but see 1 Hale, 687; 3 Inst. 51.

⁵ 1 Hale, 436.

⁶ 2 Hawk. c. 29, s. 20.

⁷ Fost. 360; 1 Hale, 623; U. S. v. Burr, 4 Cranch, 502.

⁸ Com. v. Andrews, 3 Mass. 126; Com. v. Briggs, 5 Pick. 429; Com. v. Woodward, Thacher's C. C. 63.

⁹ State v. Graff, 1 Murphey's R. 270; see State v. Goode, 1 Hawks, 463; Harty v. State, 3 Blackford's Ind. R. 386.

¹⁰ State v. Duncan, 6 Iredell, 98; though see in Virginia, Com. v. Williamson, 2 Virg. C. 211; and S. Carolina, State v. Sims, 2 Bail. S. C. 29.

Massachusetts, an accessory, in a capital case, cannot be tried at common law without his own consent, even where the principal has died before conviction.¹ But where there have been two principals, one of whom has been convicted, the other of whom is dead, he must answer notwithstanding the non-conviction of the second.²

Conviction of the principal is *prima facie* evidence of his guilt, on the trial of the accessory.³ In Virginia, in an early case, where the principal and accessory were charged in the same indictment for murder, and the principal was first tried, and convicted of murder in the second degree, and before judgment was pronounced against him, the accessory was tried, and the jury found a verdict against him, subject to the opinion of the court, whether the accessory could be tried before the principal had judgment, he being in custody, convicted, as principal, it was decided that, under the statute, conviction alone, without attainder, is sufficient.⁴ In Massachusetts, however, as has been seen, by the revised statutes, the accessory may be tried for a substantive felony, whether the principal be convicted or not; and the same provision exists in several of the states. So far as receiving stolen goods, knowing them to be stolen, is concerned, the modification is almost universal. In general, however, in other respects, the common law remains unchanged. The Massachusetts statute, like that of 7 Geo. 4, c. 64, s. 9, of which it is a transcript, only applies where the accessory might at common law have been indicted with or without the conviction of the principal, and therefore where a defendant was indicted as accessory before the fact to the murder of S. N., she having, by his procurement, killed herself, it was holden that the statute did not apply.⁵

Where the principal and accessory are tried together, (which is in general the best and most usual way,) if the principal plead otherwise than the general issue, the accessory shall not be bound to answer, until the principal's plea be first determined.⁶ Where the general issue is pleaded, however, the jury must be charged to inquire first of the principal, and, if they find him not guilty, then to acquit the accessory; but if they find the principal guilty, they are then to inquire of the accessory.⁷ Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, the judges, it is said, were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should be acquitted also.⁸

In New York, "an indictment against an accessory to any felony may be found in the county where the offence of such accessory shall

¹ Com. v. Phillips, 16 Mass. 423.

² Com. v. Knapp, 10 Pick. 477. For statutes, see ante, p. 153.

³ Com. v. Knapp, 10 Pick. 477; State v. Duncan, 6 Iredell, 236.

⁴ Com. v. Williamson, 2 Virg. C. 211. See as to common law, ante, p. 163.

⁵ R. v. Russell, 1 Mood. C. C. 356.

⁶ 9 H. 7, 19; 1 Hale, 624; 2 Inst. 184.

⁷ 1 Hale, 624; 2 Inst. 184.

⁸ R. v. Donnelley and Vaughan, R. & R. 310; 2 Marsh. 571.

have been committed, notwithstanding the principal offence was committed in another county, and the like proceedings shall be had thereon in all respects, as if the principal offence had been committed in the same county."¹

An accessory cannot take advantage of an error in the record against the principal; and the attainder of the principal, while unreversed, is *prima facie* evidence against the accessory of the principal's guilt.²

In South Carolina, it has been held, that at common law it is not necessary in an indictment against an accessory before the fact, in a felony, to set out the conviction or execution of the principal.³

In Tennessee, where a principal to a murder was sentenced to imprisonment for life, an accessory before the fact, subsequently tried and convicted, was held to be properly sentenced to the same period.⁴

The indictment must show the offence to have been committed with as much particularity as is necessary in an indictment against the principal. Thus, in Virginia, when the indictment was as follows: "Amherst county, Superior Court of Law and Chancery, to wit: The grand jurors empanelled and sworn at September term, 1834, upon their oath present, that J. W. Dudley, late of the county of Amherst, labourer, with force and arms, in the county aforesaid, and within the jurisdiction of the said superior court, on the 1st day of September, 1834, did wilfully and knowingly aid, abet, and counsel a certain W. M. Davis, in unlawfully, maliciously, and wilfully fighting a duel with pistols, with a certain W. M. Lambert, then and there being, the probable consequence of such weapons might be the death of the said Davis or the said Lambert, and the jurors upon their oaths say, that the said Dudley did, as aforesaid, aid, abet, and counsel the said Davis in fighting the said duel, which took place at the time, place, and manner aforesaid, against the form of the statute in such cases made and provided, and against the peace and dignity of this commonwealth;" Upshur, J., on demurrer said, "in an indictment for aiding and assisting in fighting a duel, it is indispensable to charge that a duel was fought. Perhaps it was the intention of the attorney to do so in this instance, and the language of the indictment may possibly be susceptible of a different construction; and, therefore, is wanting in that directness and precision of averment, which are necessary in an indictment. This defect being, in our opinion, fatal, we have not thought it necessary to turn our attention to other objections."⁵

Under the criminal code of Illinois, which declares, that an accessory before the fact "shall be deemed and considered as principal and punished accordingly," an accessory may be indicted and convicted as a principal.⁶

If the felony is not committed, he who counsels or commands its commission is not liable as accessory before the fact, but it seems he may be convicted for the attempt as a substantive misdemeanor.⁷ In

¹ Rev. Stat. Part iv. Chap. II.; Tit. 4, art. II. sec. 48.

² *State v. Duncan*, 6 Iredell, 236; *Com. v. Knapp*, 10 Pick. 477.

³ *State v. Sims*, 2 Bail. S. C. Rep. 29; *State v. Evans*, Ib. 66; but see ante, p. 163, n. 10.

⁴ *Nuthill v. State*, 11 Hump. 247.

⁵ *Com. v. Dudley*, 6 Leigh's Va. R. 614. ⁶ *Baxter v. The People*, 3 Gilman, 368.

⁷ 2 East, B. 5; Ch. C. L. 264. See Wh. C. Law, "Attempts."

New York, on the trial of an indictment under the statute for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him materials for the purpose: it was held sufficient to warrant a conviction, though the prisoner did not mean to be present at the commission of the offence, and K. never intended to commit it.¹ The law undoubtedly is, that a solicitation to commit murder, though unaccompanied with any overt act whatever, is indictable as a misdemeanor.

It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods, or otherwise, he is guilty as accessory of the offence.²

Accessories after the Fact.

An accessory after the fact is one who, when knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon,³ whether he be a principal or an accessory before the fact merely.⁴ Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact: as, for instance, that he concealed him in his house,⁵ or shut the door against his pursuers, until he should have an opportunity of escaping,⁶ or took money from him to allow him to escape,⁷ or supplied him with money, a horse, or other necessities, in order to enable him to escape,⁸ or that the principal was in prison, and the defendant, before conviction, bribed the jailer to let him escape, or supplied him with materials to effect the same purpose.⁹ Merely suffering a felon to escape, however, will not charge the party so doing, such amounting to a mere omission.¹⁰ So, if a person supply a felon in prison with victuals or other necessities for his sustenance,¹¹ or succour and sustain him if he be bailed out of prison;¹² or professionally attend a felon sick or wounded, although he know him to be a felon;¹³ or speak or write in order to obtain a felon's pardon or deliverance,¹⁴ or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly;¹⁵ or even if he himself agree, for money, not to give evidence against the felon;¹⁶ or know of the felony and do not discover it;¹⁷ it seems that these acts will not be sufficient to make the party an accessory after the fact.

Two things are laid down in the books as necessary to constitute a man accessory after the fact to the felony of another.

1. The felony must be completed.¹⁸

2. The defendant *must know that the felon is guilty*,¹⁹ and this, therefore, is always averred in the indictment.²⁰ And though it seems

¹ *People v. Bush*, 1 Hill, N. Y. R. 133.

³ 1 Hale, 618; 4 Bl. Com. 37.

⁶ Dalt. 530, 531.

⁷ 9 H. 4, 1.

⁹ 1 Hale, 621; Hawk. b. 2, c. 29, s. 26; Archbold by Jervis, 9.

¹⁰ 1 Hale, 619.

¹¹ 1 Hale, 620.

¹² Id.

¹³ 1 Hale, 332.

¹⁴ 26 Ass. 47. ¹⁵ 3 Inst. 139; 1 Hale, 620.

¹⁶ Moore, 8.

¹⁷ 1 Hale, 371, 618.

¹⁸ 1 Ch. C. L. 264; 1 Hale, 622; 2 Hawk. c. 29, s. 35.

¹⁹ 1 Hale, 622; Hawk. b. 2, c. 29, s. 32; Com. Dig. Justices, T. 2.

²⁰ Hawk. b. 2, c. 29, s. 33.

² *Keithler v. The State*, 10 S. & M. 192.

⁴ 2 Hawk. c. 29, s. 1; 3 P. Wms. 47f.

⁵ 1 Hale, 619.

⁸ Hall's Sum. 218; 2 Hawk. c. 29, s. 26.

to have been doubted whether an implied notice of the felony will not, in some cases, suffice, as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety,¹ it is now the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge.² The only relation which excuses the harbouring a felon, is that of a wife to her husband, because she is considered as subject to his control, as well as bound to him by affection.³ But at common law, no other ties, however near, will excuse; for if the husband protect the wife, the father his son, or a brother his brother, they contract the guilt, and are liable to the punishment of accessaries to the original felony.⁴

Where the principal and accessory are joined in an indictment, and tried separately, the record of the principal's conviction is, *prima facie*, evidence of his guilt, upon the trial of the accessory; and as the burden of proof is on the accessory, he must show clearly that the principal ought not to have been convicted.⁵ But the accessory, in such case, is not restricted to proof of facts that were not shown on the former trial, and which are incompatible with the guilt of the principal.⁶ The record of the conviction of a slave before a court of magistrates and freeholders as principal in a felony, (i. e. murder,) may be given in evidence on the trial of an indictment against a free white man as accessory before the fact.⁷ In New York, a copy of the original minutes of the court, in which the principal was convicted, if entered according to the direction of the statute, is proper evidence against an accessory before the fact; it appearing that no record of judgment of such conviction has been signed and filed; and it is reasonable to suppose, that the original minutes are equally sufficient.⁸ But the rough minutes or original entries, not inspected or approved by the court, according to the statutes, are not evidence.⁹

In an indictment against a free white person, under the Georgia statute of 1840, for being accessory after the fact in the receipt of stolen goods, charging that a negro man slave, Bob, was the principal felon, and stole the goods, it was held, that in order to convict the defendant, the state must prove that Bob stole the goods; and that in all cases where a person is charged with being accessory after the fact, the guilt of the principal must be proved.¹⁰

¹ Dyer, 355; Staunf. 41 b.

² 1 Hale, 323, 622; 3 Peere Wms.

³ 1 Hale, 621; Hawk, b. 2, c. 29, s. 34; 4 Bla. Com. 39; Com. Dig. Justices, T. 2.

⁴ Ibid.

⁵ Com. v. Knapp, 10 Pick. 484; State v. Chittum, 2 Dev. 49.

⁶ Com. v. Knapp, 10 Pick. 484.

⁷ State v. Sims, 2 Bail. S. C. Rep. 29; State v. Crank, Ib. 66.

⁸ People v. Gray, 25 Wendell, 465.

⁹ Ibid.

¹⁰ Simmons v. State, 4 Geo. 465.

CHAPTER IX.

DEFENCE IN HOMICIDE CASES.

I. PROVOCATION.

1st. Words, gestures, and other light provocations.

(1.) When the intent is to kill.

(2.) When it is only to chastise.

2d. Dishonour.

3d. Cooling time.

4th. Trespass.

5th. Blows.

(1.) Where the parties are equal.

(2.) Where there is a disparity in strength or weapons.

(3.) Where the intent is to kill.

(4.) Where the intent is to chastise.

(5.) Where the mortal blow is deliberately given when the deceased is disarmed or helpless.

(6.) Where the attack was sought by the party killing.

(7.) Where the revenge is cruel and unusual.

(8.) Where there was an old grudge.

(9.) Where a third party interferes in the combat of others.

6th. Restraint or coercion.

7th. Duelling.

II. Misadventure.

III. Excuse and justification.

1st. Repulsion of a felonious assault.

(1.) On person.

(a.) What the nature of the assault must be.

(b.) How far retreat is necessary.

(c.) What certainty must exist as to felonious intent.

(d.) By whom the right may be exercised.

(e.) How far want of premeditation is necessary.

(2.) On property.

2d. Execution of the law.

3d. Killing of fugitives from arrest.

4th. Self-preservation in shipwreck.

IV. Death produced by other causes.

V. Character of defendant.

VI. Character of deceased.

I. PROVOCATION.

1st. *Words, gestures, and other light provocations.*

(1.) When the intent is to kill.

No provocation whatever can render homicide justifiable, or even excusable; the least it can amount to is manslaughter.¹ Words of re-

¹ Kel. 135; 1 Hale, 466; Fost. 290; U. S. v. Travers, U. S. Cir. Court, 2 Wheeler's C. C. 504; Com. v. York, 9 Metc. 93; State v. Tackett, 1 Hawks, 210; Allen v. State, 5 Yerger, 453; Jacob v. State, 3 Hump. 493; King v. Com., 2 Va. Cases, 98.

proach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person.¹

The intent, in most instances, is to be drawn from the weapon used. Where it is intended merely to chastise, and death ensues, the offence is manslaughter: where it is intended to kill, it is murder.² Thus, where a woman called a man, who was sitting drinking in an ale-house, "*a son of a whore*," upon which the man took up a broom-staff, and at a distance threw it at her and killed her; and it was propounded to the judges whether this was murder or manslaughter. Two questions were made, 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter; 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The judges were not unanimous upon this case; and, as the consequence of a resolution on either side was great, it was advised that the king should be moved to pardon the offender; which was accordingly done.³

Where, a boy twelve years old, who had been in the habit of going to a cooper's shop, and taking away chips, was told one morning by the cooper's apprentice not to come again, he however went again in the afternoon, and the apprentice spread his arms out to prevent his reaching the spot where he usually gathered the chips, on which the boy started off, and in passing a work bench took up a whittle (a sharp-pointed steel knife with a long handle) and threw it at the apprentice, and the blade of the whittle entered his body, to the depth of four inches, and caused his death; the jury having found him guilty upon an indictment for manslaughter; Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge.⁴

A charge "that although in general mere words might not be sufficient to reduce the crime of murder to manslaughter, yet the jury were the judges, whether the provocation if more than by mere words was sufficient," should be refused as calculated to mislead the jury; because it leaves them to infer that mere words may in some cases thus reduce the offence; because it assumes that it is not the province of the court, but of the jury, to pass upon the legal sufficiency of the provocation; because there being uncontradicted evidence of express malice, no degree of provocation could extenuate the offence, and the charge in that view of the case was inapplicable to the fact.⁵ And as a general rule under such circumstances, it is proper to instruct the jury that they must take into consideration the weapon used, as well as the degree of deliberation, as important ingredients in the question how far the provocation sufficed.

If there be a chiding between husband and wife, and the husband

¹ 1 Hale, P. C. 456; Fost. 290; U. S. v. Wiltberger, 2 Washington's C. C. R. 515; U. S. v. Travers, per Story, J., 2 Wheeler's C. C. 507; Com. v. York, 9 Met. 93; R. v. Campbell, 7 Bost. L. R. 131; State v. Tackett, 1 Hawks, 210; State v. Merrill, 2 Dev. 269.

² See Jacob v. State, 3 Humph. 493.

³ 1 Hale, 455.

⁴ Langstaff's case, 1 Lewin, 162.

⁵ Felix v. The State, 18 Ala. 72.

strike his wife thereupon with a pestle, so that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter.¹

Where A passing by the shop of B distorted his mouth, and smiled at him, and B killed him; this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing.²

In cases of provocation of a slighter kind, not amounting to an assault, as the ground of extenuation would be that the act of resentment which has unhappily proved fatal, did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, and from the manner of the chastisement. For if on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner, so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him.³

If A be passing along the street, and B meeting him (there being a convenient distance between A and the wall) take the wall of him, and thereupon A kill B, this is murder: but if B had justled A, this justling had been a provocation, and would have made it manslaughter.⁴

As will presently be seen more fully, where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis*, occasioned by the provocation. Thus where A is passing along the street and B meeting him, (there being convenient distance between A and the wall) takes the wall of him and justles him, and thereupon A kill B, it is said that such justling would amount to a provocation which would make the killing only manslaughter. And so it was considered that where A riding on the road, B whipped the horse of A out of the track, and then A alighted and killed B, it was only manslaughter.⁵

Though words of *menace of bodily harm* are not a sufficient provocation to reduce the offence of killing to manslaughter; yet it has been considered that such words ought, at least, to be accompanied by some act denoting an immediate intention of following them up by an actual assault.⁶

But, though words of slighting, disdain, or contumely, will not of themselves make such a provocation as to lessen the crime into manslaughter; yet, it seems that if A give indecent language to B, and B thereupon strike A, but not mortally, and then A strike B again, and then B kill A, that this is but manslaughter. The stroke by A was deemed a new provocation, and the conflict a sudden falling out; and on those grounds the killing was considered as only manslaughter.⁷

Selfridge's case, which will be given in the appendix, is that which in America is usually relied on to sustain a more liberal view of the law in this respect. It is due, however, to the respectable judge by

¹ 1 Russ. on Cr. 514.

² 1 Hale, 455.

³ 1 East, P. C. 235; 4 Blac. Com. 199.

⁴ 1 Hale, 455.

⁵ Kel. 135; 1 Hale, 455.

⁶ 1 East, P. C. c. 5, s. 29, p. 233; see *Short v. State*, 7 Yerger, 510.

⁷ 1 Hale, 455.

whom was given the charge which led to the defendant's acquittal, to state that the *terms* of the charge, with but a few slight exceptions, are conformable to the established principles of the common law. The principal points which were laid down are these:—

“Firstly. That a man who in the lawful pursuit of his business is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise to save his own life or prevent the intended harm; such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.

“Secondly. When the attack upon him is so sudden, fierce and violent, as that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

“Thirdly. When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

“Of these three propositions, the last is the only one that will be doubted any where; and this will not be doubted by any who are conversant in the principles of the criminal law. Indeed if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause, are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case:—A in the peaceable pursuit of his affairs, sees B rushing rapidly towards him, with an outstretched arm, and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his hand, strikes B over the head, before, or at the instant the pistol is discharged, and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A. Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require, that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol was loaded. A doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.

In another part of the charge, it is said, “I doubt whether self-defence could in any case be set up where the killing happened in consequence of an assault only, unless the assault be made with a weapon, which, if used at all, would probably produce death.

“When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defence.

“There is another point of more importance for you to settle, concerning which you must make up your minds from all circumstances

proved in the case, namely, whether the defendant could probably have saved himself from death, or enormous bodily harm, by retreating to the wall, or by throwing himself into the arms of his friends, who would protect him. If you believe under all the circumstances, the defendant could have *escaped* his adversary's vengeance, at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted. If you believe, his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him, as will deprive him of the privilege of setting up a defence of this nature.

"It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace were intended by the deceased, there are certain principles of honour and natural right, by which the killing may be justified. These are principles which you as jurors, and I as a judge, cannot recognise. The laws which we are sworn to administer are not founded upon them. Let those who choose such principles for their guidance, erect a court for the trial of points and principles of honour; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life, or his person *from the great bodily harm which was apparently intended by the deceased against him, except* killing his adversary, were in his power, he has been guilty of manslaughter, notwithstanding you may believe that the case does not present the least evidence of malice or premeditated design to kill the deceased.

"If a man for the purpose of bringing another into a quarrel, provokes him, so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger, kill his adversary, he will be guilty of manslaughter, if not murder, because the necessity being of his own creating, shall not operate in his excuse.

"You are therefore to inquire whether this assault upon the defendant by the deceased, was or was not by the procurement of the defendant; if it were, he cannot avail himself of the defence now set up by him.

Abstractedly the only point in which the propositions just given vary from the common law occurs in the third paragraph. By the law thus stated, a person suspecting that a larceny on the person is about to be committed by an assailant, would be justified in killing the assailant to prevent it. And what is more, the position goes the broad length of saying that when there is "reasonable ground," for one man to suspect another of an intent "to destroy his life," or to "commit any felony upon his person," the former may take the latter's life, no matter how unfounded is the suspicion, or how abundant are the opportunities of arresting the apprehended felon by a less bloody process. It was in fact to this proposition, which was stated independently, that the attention of the jury was particularly called from the very fact of the struggle of the judge to reconcile it with the current of authority. That it was the clause on which the jury hung their

verdict, cannot now be asserted; but that it has been quoted before and since to justify those cases in which personal violence has been used, either to arrest or to punish suspected crime, is a fact with which those acquainted with criminal trials cannot but be familiar.

One other feature in the charge, which it would be improper here to introduce without dissent, is that which is italicized in the text, and which assumes the fact that "great bodily harm was apparently intended by the deceased against the defendant." The assumption of such a matter of fact should never be made in such a way as to lead to the belief that it is a matter of law. How far the assumption was justified in the present case will be seen by the following summary of the evidence:—The deceased, Charles Austin, was a student in Harvard University, about eighteen years of age, "tall, but not stout, and not called strong," and the son of a gentleman who had been for some time, as appeared in evidence, an active politician in the democratic ranks. The defendant was a member of the Suffolk bar, a man somewhat advanced in his profession, conspicuous himself as a federalist, and distinguished, it was said, no less for the urbanity of his manners than the excellence of his attainments. A quarrel had arisen between the defendant and the father of the deceased, on the subject of a political celebration of the fourth of July; and so great was the party heat of the times, that it seemed advisable to the defendant and his friends, and appeared quite natural to the jury, that the dispute should be settled by stress of arms. Mr. Selfridge was informed, it was said, by a friend, on the morning of the homicide, that he was to be attacked; and he stated to another, a few minutes before the meeting, that he understood Mr. Austin, the father of the deceased, had procured some one to bully him, though it is difficult to see why such a declaration, not part of the *res gestæ*, but evidently set up for the purpose of contingent justification, should have been admitted. Much variance of testimony existed on the subject of the conflict. John M. Lane testified that he was standing at the door of his shop, on the north side of State street, between Wilson's lane and Exchange lane, and saw the defendant standing on the pavement when young Mr. Austin was approaching, and that the defendant, when the deceased was at arm's length, took deliberate aim at him and fired; after which the deceased aimed several strokes at him, and fell. Edward Horn testified that, as he was passing by, he heard a loud talking, and looking round he saw Selfridge with a pistol in his hand, heard the pistol immediately fired, and then saw the deceased aim one or two convulsive blows at the defendant and fall. Ichabod Frost testified substantially to the same facts. On the part of the defendant it was shown that the deceased, Charles Austin, usually carried a rattan, but that morning had procured a larger stick—and a series of witnesses were produced to show a state of facts different from that proved by the commonwealth's evidence. John Bailey testified that Charles Austin had been standing in front of his shop that morning, in conversation with a fellow-student—that shortly after Selfridge approached—that Austin then, lifting his cane, with the heavy end in his hand, moved towards Selfridge, and that he raised the cane as if to strike, and while it was in the act of descending the pistol was fired. Zadoc French swore to the same effect. Richard

Edwards saw Selfridge with the pistol extended—saw Austin aim a blow at him, and heard the pistol discharged, though not until the blow had fallen. Horatio Bars could not say who struck the first blow. Lewis Glover swore distinctly that Austin had struck at Selfridge before the pistol was fired. It was shown, in addition, that the day before, Selfridge had posted the father of the deceased as “a coward, liar, and a scoundrel;” and that the latter said that “he considered it derogatory to enter into a newspaper controversy with one T. O. Selfridge,” &c. It was shown also that the deceased had mentioned to a college friend, that so long as he remained connected with the college, he could not, consistently with that connexion, take any notice of the publication of that morning; but that after he left college, neither T. O. Selfridge nor any one else should asperse his father, or any of his connexions, with impunity. On the other hand, it was shown that the deceased was accustomed to carry a stick of the same size whenever he walked in from Cambridge; and that, while he had passed the morning in such a way as to make the idea of a preconcerted attack absurd, his father, when called to the stand, expressly swore that so far from having schemed, either for himself or his son, a collision with the defendant, the thing was farthest from his mind, and, to use his strong language, “I appeal to God, he would have passed me as safely as he stands at this bar.”

Such were the facts upon which the above charge was given, and on which the jury thought proper to acquit the defendant of manslaughter to which the bill of indictment was limited, he having previously been admitted to *two thousand dollars bail by the Supreme Judicial Court*. That the whole case—bill, bail, and verdict—exhibit a singularly loose estimate of the value of human life, must be admitted. If the commonwealth’s witnesses, by whom it was shown that the defendant had previously prepared a pistol for the encounter, were to be believed—and the commonwealth’s witnesses alone could have been heard on an application to hold to bail, and before the grand jury,—the case would have been one, taking the previous posting into consideration, of murder. But it is strange to see, from the defendant’s own case, how anything lower than manslaughter could be extracted. He had not retreated to the wall, for he had fired instantaneously, at the first encounter—and it cannot be said that a man of thirty, armed with a pistol, can be reduced to desperate danger by the onset of another of eighteen, with a cane in his hand, of which he was holding the heavy butt-end, in a street in which there were a dozen spectators. The whole case showed an intention, on the part of Selfridge, to shoot down any one who should meet him; but it is difficult to collect, from the conduct of Charles Austin, that there was any settled purpose of revenge on his mind, or any other feeling than that which would naturally occupy the breast of a young man of eighteen, who had just seen his father posted as a scoundrel.¹

¹ The defence, shadowed out rather than expressly delineated, by Mr. Dexter, in a speech of consummate ability, was the same as that presented by Mr. Selfridge, in a statement subsequently published: “The honour of a gentleman should be as sacred as the virtue of a woman: but the female is authorized to take his life, who would violate her honour. Why is not a man bound to maintain his honour at the same hazard?”

That Selfridge’s trial was made a political issue, appears from a contemporaneous letter from Mr. Cunningham to Mr. Adams, (Cunning. Cor. 70,) in which he says: “I

The defendant cannot prove threats made by the deceased against him, without also proving that such threats came to his knowledge before the killing.¹

In what cases a *reasonable* ground to believe that life is in immediate danger, (though in truth it is not,) will be considered a good defence, will be examined at large hereafter.

(2.) Where the intent is only to chastise.

A large class of cases occurs in practice where slight provocations have been considered as extenuating the guilt of homicide, upon the ground, that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life.² Thus where it appeared that the prisoner, having employed her step-daughter a child of ten years old, to reel some yarn, and finding some of the skeins knotted threw at the child a *four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also shown that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered of great difficulty, and no opinion was ever delivered by the judges. The doubt appears to have been principally upon the question, whether the instrument was such as would probably, at the given distance, have occasioned death or great bodily harm.³

On an indictment for wounding with a tin can, with which the prisoner had struck the prosecutor four times on the head, Alderson, B., directed the jury to consider, "whether the instrument employed was, in its ordinary use, likely to cause death; or, though an instrument unlikely under ordinary circumstances to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise? A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head with it, you will say, whether he did this merely to hurt the prosecutor, and give him pain, as by giving him a black eye or bloody nose, or whether he did it to do him some substantial grievous bodily harm. When a deadly weapon, such as a knife, a sword, or gun, is

happened to be at the first court at Worcester which was holden after the acquittal of Mr. Selfridge. There I was told by Mr. Speaker Begden and others, that I was accused of having apostatized from federalism. I informed them, that if the expression of my firm conviction that Selfridge had been guilty of murder, and ought to have been hanged, was the sole ground of the accusation, and that if that was enough to constitute a secession from federalism, I wish to be considered as seceding. But I was not ejected. The great political parties in the State, arranged under their respective standards on the simple question of the guilt or innocence of an individual under a criminal accusation, was a curious spectacle."

¹ Powell v. The State, 19 Ala. 577.

² Fost. 291; 4 Blac. Com. 200; State v. Tackett, 1 Hawks, 210; State v. Roberts, Ib. 349; Com. v. Green, 1 Ashmead, 289.

³ Hazel's case. 1 Leach. 368. 1 Fost. p. 222

used, the intent of the party is manifest, but where an instrument like the present is used, you must consider, whether the mode, in which it was used, satisfactorily shows that the prisoner intended to inflict some serious or grievous bodily harm with it."¹

Where the prisoner, who was a butcher, had employed a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died; Nares, J., told the jury to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy; and that, if they thought the stake was an improper instrument, they should further consider, whether it was probable that it was used with an intent to kill; if they thought it was, that they must find the prisoner guilty of murder; but, on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount at most, to manslaughter. The jury found it manslaughter.²

A man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff, and threw it at her from a distance, and killed her; the judges were not unanimous, and a pardon was advised; and the doubt appears to have arisen upon the ground, that the instrument was not such as could probably, at the given distance, have occasioned death, or great bodily harm.³

A master having struck his servant, who was a lad, with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life.⁴

In a case, the keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail, and beat him, upon which the horse running away, the boy was killed. It is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly connected together by civil and natural ties, the law admits the force of a provocation done to one, to be felt by the other.⁵

Where A, finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him, it was holden to be manslaughter; but it must be understood that he beat him, not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again.⁶

The prisoner's son having fought with another boy and been beaten, ran home to his father all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died. The case was held to be manslaughter,

¹ R. v. Howlett, 7 C. & P. 274.

² Wigg's case, 1 Leach, 378.

³ 1 Hale, 455, 456.

⁴ Turner's case, Comb. 407; 1 Ld. Raym. 143; 2 Sid. 1498.

⁵ 1 East, P. C. c. 5, s. 22, p. 239.

⁶ Fost. 291; 1 Hale, 473.

on the ostensible ground of hot blood, but the authority is properly supportable on the ground that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue.¹ At the same time the case is an extreme one, in which the revenge was so deliberate, that any evidence of an intent to produce a severe chastisement, would have made the offence murder. And so in Virginia, where a man who had whipped a boy very severely, was the next day killed by the boy's father, who fell on him and beat him violently with his fists, it was held murder.²

Where a person, whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given.³

2d. Dishonour.

In this class of cases the question of *cooling time*, which is fully discussed under the next head, is of peculiar moment. Whether a homicide committed by a man smarting under a sense of dishonour is murder or manslaughter, depends upon the question whether the killing was in the first transport of passion or not. In the latter case the offence is murder, in the former, manslaughter. Thus, if a father were to see a person in the act of committing an unnatural offence with his son, and were instantly to kill him, it would only be manslaughter; but if he only hear of it from others, and go in search of the person afterwards, and kill him, when there had been time for the blood to cool, it would be murder.⁴

And so where a man finds another in the act of adultery with his wife, and kills him or her⁵ in the first transport of passion, he is only guilty of manslaughter, and that of a nature entitled to the lowest degree of punishment,⁶ for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But it has been already shown that the killing of an adulterer deliberately, and upon revenge, would be murder.⁷

In a case tried before Mr. Baron Rolfe, in 1848, it appeared that the prisoner, who was a soldier in the 14th Regiment of Foot, was cohabiting with the deceased, and that, on the 26th of May, the prisoner being confined to the barracks at Newport for drunkenness, the deceased came to him and asked him for money, when he gave her half-a-crown. Immediately after this the prisoner watched the deceased, and saw her go to the canteen of the barracks, and there drink with another soldier named Dogherty, upon which the prisoner went to his room in the barracks, and having got a cartridge from a

¹ Rowley's case, 12 Rob. 87; 1 Hale, 453; Fost. 294, 295; Cro. Jac. 296.

² M'Whist's case, 3 Grat. 594.

³ Fray's case, 1 Hawk. P. C. c. 31, s. 42; Fost. 292; 1 Russ. on Cr. 520.

⁴ R. v. Fisher, 8 C. & P. 182.

⁵ Pearson's case, 2 Lew. 216.

⁶ Manning's case, 1 Ventr. 212.

⁷ 1 Russ. on Cr. 525.

pouch and loaded his musket, he went to the barrack-yard, and there meeting the deceased, he shot her, and she instantly died. It was not quite clear on the evidence, whether the prisoner loaded the musket immediately after he took the cartridge from his pouch, or whether he left the room and returned to it after taking the cartridge, and before loading the musket. *Keating*, for the prisoner, in addressing the jury submitted, that these facts did not necessarily lead to the conclusion that the prisoner had committed the act with malice aforethought, but that the jury might be justified in convicting the prisoner of the crime of manslaughter only. The prisoner was, no doubt, strongly attached to the unfortunate woman whose life had been sacrificed, and the whole case might be summed up in a few words. It was the result of a strong feeling of affection, not the less strong because illicit, excited to jealousy, goaded to frenzy, and terminating in crime. But in the prisoner's conduct there was no trace of that premeditation, that malice aforethought, as the law aptly expressed it, which was the characteristic of murder; and therefore he trusted that the jury would acquit the prisoner of the crime of wilful murder, and find him guilty of manslaughter only. *ROLFE, B.*, (in summing up.)—It is perfectly true that the unlawful taking away of life may amount to the crime of murder or the crime of manslaughter; but with respect to the circumstances which reduce the crime of murder to that of manslaughter I shall make a few observations, differing, as I do entirely, from the observations of the prisoner's counsel. *Primâ facie*, when any man takes away the life of another, the law presumes that he did it of malice aforethought, unless there be evidence to show the contrary. Such are the cases where there has been a quarrel, a fight, or dispute, and in the violence of such quarrel, fight, or dispute, death has ensued. Undoubtedly we find other cases stated, and among them the case of adultery. It is said, that, if a man were to find his wife in the act of committing adultery, and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder: however strongly you may suspect it, it would most unquestionably be murder, and if I were to direct you, or you were to find otherwise, I am bound to tell you, either I or you would be grievously swerving from our duty. I state that without the least shadow of doubt. We must not shut our eyes to the truth. [The Judge here stated the facts as proved, observing that he thought it very immaterial as to the length of time that elapsed between the time when the prisoner saw the deceased and *Dogherty* together, and the time when he fired the shot, and equally little material whether the prisoner took the cartridge out of the pouch at the same time when he loaded the musket, or left the room between the one and the other, and concluded]—In point of law there is nothing here to reduce the crime of murder to the crime of manslaughter. The only suggestion is, that the prisoner did it because he had conceived a jealousy of the woman; even if that was so, it would not reduce the crime to manslaughter.¹

¹ *R. v. Kelly*, 2 Car. & Kir. 814.

Where the deceased, after being married for some years, left the country; and his wife, not hearing from him for two years, married the defendant, though not under circumstances which would make the second marriage legal under the Pennsylvania statute, and the deceased returned, after a lapse of a year from the second marriage, and found his wife living with the defendant, upon which a quarrel arose, which was partially composed, but which ended in the defendant deliberately shooting the deceased at his own house; it was held murder in the first degree.¹

3d. Cooling time, and herein of degree, &c.

However great the provocation may have been, if there be sufficient time for the passion to subside and for reason to interpose, the homicide will be murder. Thus, in the case already given of an adulterer, if the husband kill him deliberately and upon revenge, there having been sufficient cooling time, the provocation will not avail in alleviation of the guilt.² But where a father was informed that a man had wantonly whipped his son, a small boy, and on the evening of the next day he met the man, and then beat and stamped him with his fist and feet, whilst he was unresisting, with so much violence that the man died from the effects of the beating on the next night. It was held that this was murder, there being evidence of deliberation.³

If the jury are of opinion that the wound was given by the prisoner while smarting under a *provocation so recent and so strong*, that the prisoner might be considered as not being at the moment the *master of his own understanding*, the offence will be manslaughter; but if there had been, as is remarked by a learned annotator,⁴ after the provocation, sufficient time for the blood to cool, and for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner displayed thought, contrivance, and design, in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion.

If, upon a sudden quarrel, the parties agree to fight upon the spot, or if, not having their weapons there, they presently, without any other matter intervening, fetch them and go into the field and fight, and one fall, it will be but manslaughter; yet if they appoint to fight the next day, or even upon the same day at such an interval of time as that passion might have subsided, or if, before any blows passed, or words of anger, they agree to fight at a more convenient place, or the fight otherwise appear to be upon deliberation, and death ensue, it will be murder.⁵

In order to mitigate a homicide, committed in a second combat, by what occurred at a previous one, which had fairly began on the sud-

¹ Com. v. Smith, 7 Smith's Laws, App., and see app. to this vol.; 2 Wheelr's C. C. 80.

² Post. 296, ante, 178, 9. ³ M'Whist's case, 3 Gratt. 594. ⁴ 2 Car. & Kir. 814.

⁵ Post. 297; 1 Hale, 458; Kel. 27; 1 Hawk. c. 31, s. 22, 29; MS. Tracy, 56; 4 Blac. Com. 191; 3 Inst. 51; 1 Bulst. 86; Ld. Morley's case, 7 St. Tr. 421; Kel. 56; Crompt. 23; 1 Sid. 287. For a very interesting collection of cases on this point, see Mr. Townsend's Modern State Trials, i. 151, et seq.

den, both contests must be considered as making one combat, or the first as a separate combat, must be considered as a sufficient sudden provocation for either a second combat, or for a subsequent attack producing a contest not entitled to be called a mutual combat.¹

Where the defendant was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about three hundred yards, passed through his bed-room to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased, giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two places, saying, he had served him right; after this, the prisoner ran home, repassed through the rooms to the pantry, and went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry. Tindal, C. J., told the jury, that the principal question was, whether the wounds were given by the prisoner whilst smarting under a provocation so recent, and showing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only; or whether, after the provocation, there had been time for the blood to cool, and reason to resume its sway before the wound was inflicted, in which case the offence would be murder. The jury found the prisoner guilty of murder.²

Where a man assailed has retreated from the assailant, and is secure in his separation from further personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new conflict with the aggressor. If he do so, and slay him, he is guilty of murder or manslaughter, according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leave the scene of outrage, procure arms, and in the heat of blood consequent upon the wrong, return and renew the combat, and slay his adversary, both being armed, such a homicide would be but manslaughter. For the law, from its sense of and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind, smarting under the original wrong.³

Upon an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public house till about twelve o'clock at night; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen; the knife, a common bread and cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was

¹ *State v. McCauts*, 1 Spear, 384.

² *R. v. Hayward*, 6 C. & P. 157.

³ *Com. v. Hare*, 4 Pa. L. J. 257.

rather weak in his intellect, but not so much so as not to know right from wrong. Lord Tenterden, C. J., "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place." It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have: for aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connexion of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind (which under the circumstances, I should think you hardly would) then you will find him guilty of murder.¹

If, in fine, there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.²

The law assigns no limits within which cooling time may be said to take place. Every case must depend on its own circumstances,³ but the time in which an ordinary man, in like circumstances, would have cooled, may be said to be the reasonable time.⁴

In a leading case, Major Oney was indicted for the murder of Mr. Gower, and a special verdict was found, stating that the prisoner, being in company with the deceased and three other persons at a tavern in a friendly manner, after some time began playing at hazard, when Rich, one of the company, asked if any one would set him three half crowns, whereupon the deceased, in a jocular manner, laid down three half pence, telling Rich he had set him three pieces, and the prisoner at the same time set Rich three half crowns, and lost them to him, immediately after which the prisoner, in an angry man-

¹ *R. v. Lynch*, 5 C. & P. 324.

² *State v. Yarborough*, 1 Hawks, 7, 8; *R. v. Thomas*, 7 C. & P. 817.

³ *Com. v. Dougherty*, 7 Smith's Law, 695, post, appendix.

⁴ *State v. McCants*, 1 Spears, 384; *R. v. Mawgridge*, Kelso, 128; *R. v. Taylor*, 4 Burr., 279.

ner turned about to the deceased, and said, "It was an impertinent thing to set half pence, and that he was an impertinent puppy for so doing," to which the deceased answered, "Whoever called him so was a rascal." Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased, in return, immediately tossed a candlestick or bottle at the prisoner, which missed him, upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword, but the prisoner was prevented from drawing his by the company; the deceased thereupon threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over," and at the same time offered his hand to the prisoner, who made answer, "No, damn you, I will have your blood;" after which, the reckoning being paid, all the company except the prisoner left the room, but he, calling back the deceased, closed the door, and the rest of the company, shortly after, hearing a clashing of swords, found the deceased had received from the prisoner a mortal wound. It was further found, that from the throwing of the bottles there had been no reconciliation. Upon these facts all the judges were of opinion that the defendant had been guilty of murder, and that from the period which had elapsed there had been reasonable time for cooling.¹

If, between the provocation received and the mortal stroke given, the prisoner fall into other discourse or diversion, and continue so a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his attention was once called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder.²

If thought, contrivance, and design be shown by a prisoner in the mode of procuring a deadly weapon after provocation has been given, and in again replacing the weapon immediately after the blow with it has been struck, this tends to show that the prisoner was acting under the influence of judgment and reason, rather than of violent and ungovernable passion. The deceased was requested by his mother to turn the prisoner out of her house, which after a short struggle with the prisoner he effected, and in so doing he gave him one kick. The prisoner said he would make him remember it, and instantly went to his own lodgings from two to three hundred yards distant, passed through his bed-room and kitchen into a pantry, and returned thence hastily back again. Within five minutes after the prisoner had left the deceased, the latter followed him to give him back his hat, which had been left behind, and they met about ten yards from the prisoner's lodgings. They stopped for a short time, when they were heard talking together, but without any words of

¹ Major Oneby's case, O. B. 12 Geo. 1; 2 Stra. 766, and 2 Ld. Ray. 1485.

² Com. v. Green, 1 Ashmead, 289.

anger; after they had walked on together for about fifteen yards, the deceased gave the prisoner his hat, when the latter exclaimed with an oath, that he would have his rights, and instantly stabbed the deceased with a knife or some sharp instrument, in two places, giving him a mortal wound in the belly. As soon as he had stabbed him the second time, he said he had served him right, and instantly ran back to his lodgings, passed hastily through his bed-room, and the kitchen to the pantry, and thence back to his bed-room, where he undressed himself and went to bed. Shortly afterwards he was apprehended, and no knife or other instrument found upon him. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate, and which was kept on a shelf with his meat; and in another part of the pantry three other knives of a similar description, which he used in his business of a butcher. The several knives were found the next morning in their usual places in the pantry. Tindal, C. J., told the jury that the question for them was, whether the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding; or whether there had been time for the blood to cool, and for reason to resume its seat, before the wound was given. That in determining this question, the most favourable circumstance for the prisoner was the shortness of time between the original quarrel and the stabbing; but, on the other hand, the weapon was not at hand when the quarrel took place, but was sought for from a distant place. It would be for them to say whether the prisoner had shown thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion.¹

Where it appeared that the prisoner and the deceased, after having been engaged in mutual combat, on sudden occasion, fairly begun, were separated at the request of the prisoner, who was overcome and beaten in the contest; that the prisoner was held by one of the persons present, but drew his knife and swore he would kill the deceased; that after releasing himself from the person holding him, he pursued the deceased, who had left the place of combat, and who, upon being apprized of the pursuit by a call from the person holding the prisoner, left the road on which he was walking, and provided himself with a rail from a neighbouring fence; that on his return towards the road he met the prisoner, gave back and struck him several blows upon the head as he rushed on, with the rail, which, breaking some ten paces from the point where the deceased began to give back, the prisoner closed and inflicted the mortal blow; and that sufficient time had transpired, not only for the deceased to adjust himself after the fight and walk deliberately two hundred and twenty-five yards, but for the prisoner afterwards to pass over the same ground, as also for a person at a neighbouring house, within hearing of the noise of the second quarrel, to reach the place of strife. The court, under this state of facts, were of opinion that both contests could not

¹ *R. v. Hayward*, 6 C. & P. 167.

have constituted one combat, nor could the second, in which the prisoner rushed with his drawn knife upon his adversary, who had snatched the readiest means for defence at hand, but was neither equally armed, nor willing to meet such a weapon, have been that fair struggle which the law denominates a mutual combat. The jury having found a verdict of guilty, the court refused to disturb it.¹

The prisoner and his son were wrestling on a floor together, the son being uppermost, the son got up, and went to the door, and the prisoner took up a coal pick, and threw it at the deceased and hit him on the back. The deceased said it hurt him, and the prisoner said he would have his revenge. The deceased stood at the door with his hands against it, when the prisoner took a knife off the table and stabbed the deceased with it on the left side. The deceased said, "Father, you have killed me!" and retreated a few paces into the street, reeling as he went. A person told the prisoner he had stabbed his son. He said, "Joe, I will have my revenge!" The deceased came into the house again, and the prisoner stabbed him again in the left side. There was also evidence of expressions of ill will by the prisoner towards the deceased, and of threats uttered a short time before. Mr. J. Coleridge told the jury "in some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing. So, in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason, that the blows were not the cause of the crime." After observing on the danger of relying on the previous threats, the very learned judge proceeded, "Then I will suppose that all was unpremeditated till C. came, and then the case will stand thus, the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if when he got up and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question, (the son having given no further provocation) whether in truth that, which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done, and whether the father was acting under the recent sting, or had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and

¹ *State v. McCauley*, 1 Spears, 384.

he acting on its sting, and the blood remained hot; but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows; because, though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions."¹

Where the defendant, having been violently beaten and abused, made his escape, ran to his house, eighty yards off, got a knife, ran back, and on meeting with the deceased, stabbed him, it was held but manslaughter; but it was said that if, on the second meeting, the defendant had disguised the fact of having a weapon for the purpose of inducing the deceased to come within his reach, it would have been murder, such concealment affording ground for the presumption of deliberation.²

Where it becomes material to inquire whether a homicide committed in a second, after a previous combat, in which it might have been manslaughter, was in course of the first or a continuance of it, or after such an interval of time as would imply premeditation, the proper inquiry in such case is, not whether the suspension of reason continued down to the moment of the mortal stroke given, but did the prisoner cool, or was there time for a reasonable man to have cooled?³

Where, in New York, the prisoners, three women, each of them armed with clubs, had fallen into a quarrel with the deceased, who was also armed with a club, and had been chased by him for some distance till he stopped, upon which one of them turned round and gave him a mortal blow, it was held manslaughter.⁴ The indulgence which the law extends to cases of this description is founded on the supposition that a state of sudden and violent exasperation is generated in the affray, so as to produce a temporary suspension of reason, and that the transport of passion excludes the presumption of malice.⁵

4th. Trespass.

A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence, and if he do, and with it kill the trespasser, it will be murder, and this, though killing were actually necessary to prevent the trespass.⁶ In an old case, A, finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him; this was holden to be manslaughter. To extenuate the offence, in such case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and deter the offender from repeating the like, and it must so appear. For if A had knocked out the brains of the deceased with a bill or hedge-stake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it would have been murder.⁷

¹ *R. v. Kirkham*, 8 C. & P. 115.

² *State v. Norris*, 1 Hay. 429.

³ *State v. McCauts*, 1 Spears, 384.

⁴ *People v. Garretson et al.*, 2 Wheeler's C. C. 347; *U. S. v. Thayer*, U. S. Cir. Court, 2 Wheeler's C. C. 503.

⁵ *Ibid.*

⁶ *Com. v. Drew*, 4 Mass. 391; *State v. Morgan*, 3 Iredell, 186; *M'Daniel v. State*, 8 S. & M. 401; *Oliver v. State*, 17 Ala. 588.

⁷ *People v. Jones*, 17 N. Y. 376; *Faulkner v. State*, 34 Me. 132.

Where A, finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was holden to be manslaughter, it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word.¹ Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person, who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died: being indicted for murder, he was found guilty and executed.²

As has already been observed where death ensues by the act of one in the pursuit of an unlawful design, without intent to kill, it is murder or manslaughter, as the intended offence was felony or misdemeanor.³

A man has a right to order another to leave his house, but has no right to put him out by force, until gentle means fail; and if he attempt to use violence in the onset and is slain, it will not be murder in the slayer, if there is no previous malice.⁴

5th. Blows.

(1.) Where the parties are equal.

Any assault in general, made with violence or circumstances of indignity upon a man's person, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manslaughter; and the same rule would apply, says Lord Hale, if when A and B were riding on the road, B had whipped A's horse out of the track, and then A had alighted and killed B.⁵

So where A seeks B and threatens his life; and they meet; a quarrel ensues; B strikes A with his fist; they separate; A attempts to arm himself with a stick, which he is unable to do; again stoops to raise another stick or billet of wood of a dangerous kind; and whilst stooping, B stabs him. It has been held that this was not murder, but manslaughter.⁶

An unintentional and trivial assault is no palliation. Thus, in a case in South Carolina, where it was argued by the defendant's counsel that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, the position was said to be equally unsupported by proof, and unavailing if true. "In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon

¹ 1 Hale, 473; Fost. 291.

² R. v. Price, 7 C. & P. 178.

³ Smith v. State, 3 Redding, 48, see ante, p. 46.

⁴ McCoy v. State, 3 Eng. (Ark.) 451.

⁵ Kel. 135; 4 Blac. Com. 191; Lamure's case, 17 Car. 1; 1 Hale, 456.

⁶ Allen v. State, 5 Yerger, 453.

another in the dark, would not authorize such a murderous attack upon him." Such an act of itself would be a sure indication of a "depraved and wicked heart, void of all social duty, and fatally bent on mischief." *

¹ State v. Tooky, 2 Rice's Digest, 104.

* The following opinion, by a very learned judge, now of the Supreme Court of Pennsylvania, bears upon the main points involved in this head:

Murder, by the common law, is "the unlawful killing of another of malice aforethought." By our act of Assembly of the 22d of April, 1794, the crime is divided into two degrees. Murder of the first degree is where the offence is perpetrated by means of poison, or by lying in wait, or in perpetrating, or in attempting to perpetrate, any arson, rape, robbery, or burglary, or by any other wilful, deliberate, and premeditated killing. This offence is punishable with death. By the same act of Assembly, murder of the second degree embraces "all other kinds of murder," to wit: all murder where there is no intention to kill, but which happens in perpetrating any other felony than those enumerated in the act of 1794, or in the deliberate perpetration of acts of cruelty or mischief which manifestly endangers life, or in their consequences materially lead to bloodshed. This offence is punishable by solitary confinement at labour in the penitentiary. "Manslaughter is the unlawful killing of another without malice aforethought, either expressed or implied; which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act," under the degree of felony. It is only with voluntary manslaughter that the jury have any thing to do in the present indictment. With involuntary manslaughter they have nothing to do at present, further than to acquit, if the prisoner is guilty of no higher offence. Before we proceed to inquire whether the prisoner is guilty of either of the offences charged in the indictment, it is proper to ascertain if he has any available ground of defence. After hearing the evidence in regard to the blow inflicted by the prisoner upon the head of the deceased with an axe, and the evidence of the three gentlemen who conducted the *post mortem* examination, the prisoner's counsel very candidly and very properly admitted that the blow was given by the prisoner, and that it caused the death of the deceased. Are there any substantial grounds of defence resting upon the principles of self-protection? Justifiable self-defence is when a man attempts by violence or surprise to commit a known felony upon the person, habitation, or property of another. In that case the individual whose rights are thus assailed may, if he finds it necessary, kill his assailant in his own defence, and the act is perfectly justifiable in him. But on a survey of the evidence in this case, we find no indication of any felony having been attempted by the deceased upon the person, habitation, or property of the prisoner. The court are unable to perceive any sufficient defence arising out of this branch of the case. But if the prisoner is not perfectly justifiable, is he excusable upon the grounds of self-defence? The law has made a slight distinction between acts which are perfectly justifiable and those only excusable. At the present day, if the prisoner is executed, it amounts to the same thing as being justified upon the grounds of self-defence. When there is an attack, under circumstances denoting an intention to take away life or to do some enormous bodily harm, it is lawful for the party thus in danger to kill the assailant if all other means are used, otherwise to prevent the injury or save the life of the party attacked. The means to be used in this case, in order to avoid the alternative of taking the life of another in defence of your own, are such as retreating as far as possible, consistent with your own safety, or disabling the adversary without killing him, if it be in your power. When the attack upon an individual is so sudden, fierce, or violent, as that a retreat would not diminish, but increase the danger, he may instantly kill his adversary, without retreating at all. When, from the nature of the attack, there is reasonable ground to believe there is a design to destroy life, or commit any felony upon his person, killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. It is for the jury to decide whether the attack upon the prisoner denoted an intention to take away life, or to do him some enormous bodily harm. If so, and he had no other means of preventing the injury, or preserving himself, he is excusable, and ought in that case to be acquitted. In like manner, if the jury believe that the attack was made under circumstances which reasonably induced the prisoner to believe that there was a design to destroy his life, or to commit any felony upon his person, the prisoner would be excusable, although in reality no such injury or felony was intended. It is for the jury to decide whether any circumstances existed which present a case of excusable homicide, according to the legal principles already laid down. Still the court will give the jury the benefit of their opinion on this question. The attack was made without any weapon, and without any attending circumstances denoting an intention to take life, or do enormous bodily harm; and, in the opinion of the court, did not excuse the prisoner in the

In a sudden and equal quarrel, when both parties strike in the heat of blood, it is immaterial by whom the first blow is struck.

use of a weapon so deadly as an axe. If the prisoner is neither justified nor excused in destroying the life of the deceased, of what offence is he guilty? It cannot be said to be involuntary manslaughter, where the use of a deadly weapon, as well as the manner of using it, strongly indicate an intention to kill. For the same reason, in the opinion of the court, the prisoner cannot be convicted of murder in the second degree, which, we have already seen, is where there is no intention to kill. Still, if the jury believe that there was a deliberate design to inflict a grievous and dangerous wound, without justification or excuse, and without any design to kill, they may find the prisoner guilty of murder in the second degree. On this point the court have already intimated their opinion that the use of the axe, and the manner of using it, sufficiently indicates an intention to kill, and if so, under the evidence in the cause, it is not a case of murder in the second degree. If this view of the case be correct, the prisoner is guilty of either "murder in the first degree," or "voluntary manslaughter,"—the crime depending, for its name and character, upon the finding of the jury, on the question whether the act was perpetrated with malice aforethought, or without it, or in other words, with deliberation, or without it. If with deliberation, or with malice aforethought, it is murder in the first degree. If without deliberation, or without malice aforethought, it is voluntary manslaughter. It is alleged that this act was committed in pursuance of an old grudge of several years' standing, and that the prisoner, at the time he killed the deceased, was moved by that ancient hatred, and not by the sudden provocation which was given. If this be so, the crime is murder in the first degree. Were there any circumstances which extenuate this sudden act of destruction into voluntary manslaughter? To extenuate a homicide from murder to manslaughter, both provocation and passion must exist. Provocation without passion will not extenuate the offence, nor will passion without provocation. This provocation must be such as is deemed in law sufficient to deprive the party of deliberation. No words, however insulting, no trespass to lands or goods, are held sufficient; but assault upon the person, or blows, are deemed sufficient to excite the passions to such an extent as to deprive the mind, for the moment, of the power to deliberate. What was the provocation here? The prisoner, on his return from his day's employment, called at the tavern of William Sproul, in company with his daughter, in the evening. Hearing the deceased making a loud noise in the bar-room, the father and daughter retired to the kitchen for the purpose of avoiding any contact with him, and the children fastened the kitchen-door, to prevent the intrusion of the deceased, who nevertheless came to the window and door, demanding admittance, and, according to one witness, making threats, and saying he would "be in, dead or alive." He thereupon forced open the door, bursting out the staple which held it fast. The prisoner, who was seated by the fire, warming himself, extended his hand to the deceased in a friendly manner, and asked him how he did. Without taking any notice of this courtesy, the deceased, without the slightest provocation, seized the prisoner by the hair, and, according to one witness, with one hand by the hair, and with the other by the throat, drew him violently back over the chair. The daughter struck the deceased in defence of her father, and the prisoner immediately grabbed for something, and seizing the axe, which lay in the chimney corner, where it had been used in preparing kindling, suddenly gave the deceased the fatal blow which caused his death. Whether the circumstances which occurred before the fatal blow were sufficient to deprive the mind of deliberation, is a question of law, and the court are of opinion that the provocation was sufficient to produce, in ordinary minds, such a degree of passion as to prevent deliberation. Whether this degree of passion was in fact produced, is a question for the jury. If they should believe that it was, and that the act was done upon a sudden heat occasioned by the provocation received, and without deliberation, then the offence is extenuated from murder in the first degree to voluntary manslaughter. If the intention to kill existed, which we think may fairly be inferred from the deadly weapon used, as well as the manner of using it, and the jury should be of opinion that the act was deliberately perpetrated, then the prisoner is, under the evidence in the cause, guilty of murder of the first degree. In conclusion: Upon the whole evidence, the court are of opinion that it is not a case of "involuntary manslaughter," because of a manifest intention to kill, as indicated by the use of a deadly weapon. That it is not a case of "murder in the second degree," for the same reason, the presence of an intention to kill. That it is not "murder of the first degree," because, although the act was "wilful," and "premeditated," yet it was not "deliberately" perpetrated, by reason of the passion produced by sufficient provocation from the deceased, depriving the prisoner, for the moment, of the power to deliberate. And that the prisoner is guilty of "voluntary manslaughter," by reason of the existence of an intention to kill, suddenly executed, without justification or excuse, in a passion, occasioned by provocation from the deceased. *Com. v. Poke, Lewis' C. L. 394-7.*

Thus, if A uses provoking language or behaviour towards B, and B strikes him, upon which a combat ensues, in which A is killed, this is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow.¹

The deceased, who was a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gaming, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner, who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his doubled fist in the face, and one blow in the eye; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by the heat of blood: but the learned judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the judges were of opinion that it was only a case of manslaughter.²

(2.) Where there is a disparity in strength or weapons.

Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow.³ Violent acts of resentment, bearing no proportion to the provocation or insult, particularly where there is a decided preponderance of strength on the part of the party killing, are barbarous, proceeding rather from brutal malignity than human frailty: and barbarity will often imply malice.⁴

Thus in the case of the keeper of a park, who, finding a boy stealing wood in his master's ground, tied him to a horse's tail, and beat him, upon which the horse running away, the boy was killed, it is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly connected together by civil and natural ties, the law admits the force of a provocation of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity; and the offence will be manslaughter.⁵

There being an affray in the street, one Stedman, a foot soldier,

¹ Fost. 295; 1 Hale, 456.

² R. v. Ayes, R. & Ry. 166.

³ R. v. Lynch, 5 C. & P. 324.

⁴ Keates' case, Comb. 408.

⁵ 1 Hale, 466; 1 Hawk. P. C. c. 30; 4 Blac. Com. 191; 1 East, P. C. c. 5, s. 19, p. 232.

ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was *murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner*, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact.¹

But even on this evidence, as it thus stands, the case has been very much doubted. Thus in Pennsylvania, Gibson, C. J., said, "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Under this view of the law I have always doubted Stedman's case."²

Still more difficult to reconcile with settled principles in this respect is the following case:—Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying, "He did not intend to hurt the officers; but he would not be ill used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: one stabbed him in nine places, he all the while on the ground, begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter *by reason of the first assault with a cane*.³ "This (says Mr. Justice Foster) is the case as reported by *Sir John Strange*; and an extraordinary case it is; that all these circumstances of aggravation, two to one, he helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol; that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane."⁴

Where a disparity exists as to means of attack and defence the party who takes life by means of such disparity cannot defend himself on

¹ Stedman's case, Fost. 292.

³ R. v. Tranter, 1 Stra. 49, ante p. 48.

² Com. v. Mosler, 4 Barr, 268.

⁴ Fost. 293, see ante, p. 48.

the ground of provocation if unfair advantage was taken, or if the weapon was used otherwise than in sudden passion.¹ Thus if B, in the case cited in the next preceding head,² had drawn his sword, and made a pass at A, the sword of A being then undrawn, and thereupon A had drawn, and a combat had ensued, in which A had been killed: for this would have been murder, inasmuch as B, by making the pass, his adversary's sword being undrawn, showed that he sought his blood. And A's endeavour to defend himself, which he had a right to do, will not excuse B: but if B had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter,³ yet if, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter.⁴ The following cases were upon this point.

The prisoner, whose name was William Snow, and who was a shoemaker, lived in the same neighbourhood as the deceased, and at no great distance from him. On the afternoon of the day mentioned in the indictment, the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning, in his way home, by the prisoner's house: and on passing the prisoner, as he sat on the bench, the deceased called out to him, "Are not you an aggravating rascal?" The prisoner replied, "What will you be, when you are got from your master's feet?" On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, "You rogue, what do you do with that knife in your hand?" and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, "The rogue has stabbed me to the heart; I am a dead man;" and expired. Upon inspection, it appeared that he had received three wounds, one very small on the right breast; another on the left thigh, two inches deep, and half an inch wide, and the mortal wound on the left breast. After much consideration, the judges determined that the offence was only manslaughter.⁵

¹ *State v. Hildreth*, 9 Iredell, 429.

² See ante, p. 187.

³ 1 Hawk. P. G. c. 31, s. 28; *Fost.* 295.

⁴ 1 East, P. C. c. 5, s. 26, p. 243.

⁵ *R. v. Snow*, 1 Leach, 151.

Upon an indictment, for maliciously cutting, it appeared that the prisoner had cut the prosecutor in a fight that took place between them, but no instrument was seen either before or at the time in the prisoner's hands. Bayley, J., "When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effects charged in the indictment, and with the instrument ready in his hand, in order that he might resort to it with any of the alleged intents, then he is guilty. For if death had ensued it would have been murder."¹

Mr. East tells us that the judges thought in this case, that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour, to revenge his former quarrel, by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening: and when the deceased passed by, neither provoked him by word nor gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders: though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the judges thought that the offence only amounted to manslaughter; and the prisoner was recommended for a pardon.²

If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon; the killing in both these cases will be murder. The prisoner and Levy quarrelled and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places; and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner; who had a clasped knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning; or if before they began

¹ Whiteley's case, 1 Lew. 173.

² 1 East, P. C. c. 5, s. 26, p. 245.

to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder: but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder.¹

John Taylor, a Scotch soldier, and two other Scotchmen were drinking together in an ale house, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist: the servant who was struck went out of the room into the yard, to fetch his fellow-servants to turn Taylor and his company out of the room; and in the mean time, an altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor, and go out of the house; and Taylor, after some further altercation, was going away, when the deceased laid hold of him by the collar, and said, "he should not go away till he had paid for the liquor;" and then threw him down against a settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage: and Taylor then said "he did not mind killing an Englishman more than eating a mess of crowdy." The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse: whereupon Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter.²

The prisoner, who had shortly before been discharged from the Coldstream guards, went to a public-house in company with his brother and another person; there were two more soldiers in the house, and the deceased was sitting with them: a dispute arose about paying the reckoning, and a fight took place between the prisoner and one Burrows: in the scuffle B. fell down by the fire-place on his knees, and the deceased jumped over the table and struck the prisoner: the deceased was turned out by the landlord, but admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out: the deceased remained about a quarter of an hour after the prisoner and then left: the prisoner and the deceased were both in liquor; the deceased tried to get out directly after the prisoner left, but was detained by the persons in the room; as soon as they let him go, he jumped over the table, and went out of the house, saying as he went, that if he caught them he would serve them out: the deceased was a person who boasted of his powers as a fighter; the deceased followed the prisoner and his brother into a mews not far from the public-house where they had been drinking; and a witness who lived

¹ R. v. Anderson, 1 Russ. on Cr. 531.

² R. v. Taylor, 5 Burr. 279; 1 Hawk. c. 31, s. 29.

near, stated that he heard a noise, and went to the door of his house, and then heard a bayonet fall on the ground, and on going out heard one Croft crying out "Police, police; a man is stabbed!" and on going up found the deceased lying on the ground wounded. Croft stated that he was near and heard voices, which induced him to run towards a bar, and when within a yard of the bar he heard a blow like the blow of a fist; this was followed by other blows; after the blows he heard a voice say "take that!" and in half a minute the same voice said, "he has stabbed me!" the deceased then ran towards him, and said, "I am stabbed!" and soon fell on the ground: the prisoner was soon afterwards taken into custody, and was then bleeding at the nose; the prisoner had not any side-arms; but his brother had a bayonet: for the defence the brother stated that when they got about twenty yards through the bar mentioned by Croft, he heard somebody say something, and deceased came up and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner who had gone on; there was a great struggle between them, and very shortly after the deceased cried out "I am stabbed!" A surgeon proved that there were wounds on the prisoner's hands, such as would be made by stabs of a bayonet, and that his back was one uniform bruise. Bosanquet, J., to the jury, "the question for you, on a careful consideration of the whole evidence, will be, whether the prisoner was guilty of either murder or manslaughter, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excusable: upon the question of whether it amounts to murder you have to consider this; did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? For if he did, it will amount to murder. But if he did not enter into the contest with an intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him? If he did, then it will be manslaughter. But there is another question; did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape. In such case, if he retreated as far as he could, he would be justified." The defendant was found guilty of manslaughter.¹

(3.) Where the intent is to kill.

To determine whether the killing upon provocation amounts to murder or manslaughter, the instrument wherewith the homicide was effected, must also be taken into consideration, for if it were effected with a deadly weapon, it will be therefore inferred that the intent was to take life, and the provocation must be great indeed to lower the grade of the crime from murder; if with a weapon or other means

¹ R. v. Smith, 8 C. & P. 160.

not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the instrument employed must bear a reasonable proportion to the provocation to reduce the offence to manslaughter. It is on this principle that we may reconcile with the general tenor of authority the case already noticed, where some provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately gave her a blow with the pommel of his sword on the breast, and then ran after her, and stabbed her in the back: this was at first deemed murder; but it appearing afterwards that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offence was holden to be manslaughter only.¹

Upon an indictment for murder, it appeared that a body of persons were committing a riot, and the constables interfering for the purpose of dispersing the crowd, and apprehending the offenders, resistance was made to them by the mob, and one of the constables was beaten severely by the mob; the different persons all took part in the violence used; some by beating him with sticks, some by throwing stones, and others by striking him with their fists: of this aggregate violence, the constable afterwards died. Alderson, B. said, "The principles on which this case will turn, are these:—if a person attacks another without justifiable cause, and from the violence used, death ensues, the question which arises is, whether it be murder or manslaughter? If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death; and if he intended death, and death was the consequence of his act, it is murder. If no weapon was used, then the question usually is, was there excessive violence? If the evidence as to this be such as that the jury think there was an intention to kill, it is murder; if not, manslaughter. Thus, if there were merely a blow with a fist, and death ensued, it would not be reasonable to infer that there was an intention to kill; in that case, therefore, it is manslaughter. But if a strong man attacks a weak one, though no weapon be used, or if after much injury by beating, the violence is still continued, then the question is, whether this excess does not show a general brutality, and a purpose to kill, and if so, it is murder. Again, if the weapon used be not deadly, *e. g.*, a stick, then the same question as above will arise as to the purpose to kill; and in any case if the nature of the violence, and the continuance of it be such, as that a rational man would conclude that death must follow from the acts done, then it is reasonable for a jury to infer that the party who did them intended to kill, and to find him guilty of murder. Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done. Here, therefore, in considering this case, you

¹ R. v. Stedman, Post. 292; Kel. 13; 1 Hale, 457; 4 Blac. Com. 200; 1 Hawk. c. 31, sect. 34. See ante, p. 190, 191.

must determine, whether all these prisoners had the common intent of attacking the constables; if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each if done by one man, would together show such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such purpose, you ought to find them guilty only of manslaughter."¹

The blow must be struck on an immediate provocation, and not upon an old grudge; for then it would amount to murder. Thus, it is not error in a judge to tell the jury, on the trial of an indictment for murder, that "if they believed from the evidence that the prisoner had malice against the deceased on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner accidentally fell in with the deceased, the question of manslaughter could not arise, as the malice would exclude provocation;" it being clear from the context of the charge that the malice spoken of was the purpose to kill or do great bodily harm to the deceased.²

If one seek another and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him, if a homicide ensues, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express.³

And such an indulgence is shown to the frailty of human nature, that where two persons, who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the case.⁴

(4.) Where the intent is to chastise.

To determine the *intent*, the *nature* of the wound forms a proper subject for consideration.

One Freeman, a soldier, was in a public house drinking, and asked a girl who was sitting there to drink with him: upon which one Ann Simpson, with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. Freeman then caught the pot from her, and struck her twice on the head with it: the blood gushed out, and she was taken to an hospital, where the wound was examined, and did not appear dangerous, being about a quarter of an inch deep; but it produced an erysipelas, which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the prisoner intended to do the woman any grievous bodily harm. Gibbs, C. B., told the jury, that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered; that the aggravation, though not constituting a provocation which would extenuate the giving a deadly blow, would palliate the giving a moderate blow; and he left it to the jury whether those blows

¹ Macklin's case, 2 Lew. 225.

³ State v. Lane, 4 Iredell, 113.

² State v. Tilley, 3 Iredell, 424.

⁴ 1 Hawk. P. C. s. 27.

were such as were likely to be followed by death, or by a disease likely to terminate in death. The jury thought that the blows were not of this kind, and the prisoner was found guilty of manslaughter only.¹

Where one, in another case, having had his pocket picked, seized the offender, and being encouraged by a concourse of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned, this was ruled to be manslaughter only.²

(5.) Where the mortal blow is deliberately given after the deceased is disarmed or helpless.

Where a party, after he has got the better of the other, and held him prostrate and defenceless, the reception of a prior blow will not reduce the grade to manslaughter. This proposition, in fact, is a corollary of that which makes a blow no mitigating provocation when there is a manifest disparity of strength between the parties. For even where no such disparity at first exists, the principle holds good when by the result of the conflict one party is disarmed, or becomes otherwise helpless. Upon an indictment for murder by strangling, it appeared that the prisoner had said, "We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down, he got up and I knocked him down again, and kicked him, and then I put a rope round his neck, and dragged him into the ditch." Patteson, J., said to the jury, "If you even believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is murder. The act is so wilful and deliberate that nothing can justify it."³

(6.) Where the attack is sought by the party killing.

The plea of provocation will not avail in any case, where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice;⁴ and it will presently be seen that even where there may have been previous struggling or blows, such plea cannot be admitted, where there is evidence of express malice; and it must appear, therefore, that when he did the fact, he acted upon such provocation, and not upon any old grudge.

(7.) Where the revenge is cruel and unusual.

In this respect the nature of the instrument is to be particularly considered. The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody, who presently took a

¹ R. v. Freeman, 1 Russ. on Cr. 518.

² 1 East, P. C. 236; 1 Hale, 456.

³ R. v. Shaw, 6 C. & P. 372.

⁴ 1 Russ. on Cr. 521, 585; State v. Ferguson, 2 Hill's S. C. R. 619; State v. Lane, 4 Iredell, 113; State v. Marten, 2 Iredell, 101; State v. Tilley, 3 Iredell, 424; 1 Hale, 451.

cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died.¹ This was ruled manslaughter, because done in a sudden heat of passion: but upon this case Mr. Justice Foster makes the following remarks.² "Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted; a disaster slight enough, and very frequent among boys. If upon this provocation the father, after running three quarters of a mile, had set his strength against the child, had dispatched him with a hedge-stake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of malice: but with regard to these circumstances, with what weapon, or to what degree, the child was beaten, Coke is totally silent. But Croke³ setteth the case in a much clearer light, and at the same time leadeth his readers into the true grounds of the judgment. His words are, 'Rowley struck the child with a *small cudgel*, of which stroke he *afterwards* died. I think it may be fairly collected from Croke's manner of speaking, and Godbolt's report,⁴ that the accident happened *by a single stroke with a cudgel not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I observe, that Lord Raymond layeth great stress on this circumstance: *that the stroke was with a cudgel not likely to kill.*'"⁵

(8.) When there was an old grudge.

When a deliberate purpose to kill or do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done.⁶ If, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will have his blood, or by preparing for the conflict, or the like, and afterwards carry his design into execution, he will be guilty of murder, although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion.⁷ Thus, where two persons quarrel, and one throws a brickbat at the other, who has privately armed himself with a deadly weapon, and keeps it concealed, in expectation of the affray, and on such assault being made upon him, immediately draws forth the weapon, and, with it, kills the assailant, though then retreating; it was held, that a verdict of murder would not be disturbed, though there was no proof of previous malice, malice being im-

¹ Rowley's case, 12 Rep. 87; S. C. 1 Hale, 453, in which report the words are, "and strikes C, that he dies." Mr. Justice Foster, in citing the case, says, that the father, after running three-quarters of a mile, beats the other boy, "who dieth of this beating." Post. 294. And see also McWhist's case, 3 Grat. 594.

² Post. 294.

³ Cro. Jac. 296.

⁴ Godb. 182. It was there said to have been a "rod," meaning probably a small wand.

⁵ 2 Lord Raym. 1498. And see also, on this point, R. v. Thomas, 7 C. & P. 817.

⁶ State v. Johnston, 3 Iredell, 354.

⁷ 1 Vent. 159; 1 Hale, 452; Oneby's case, 2 Ld. Ray. 1490.

plied from the *res gestæ*, and from the preparation of the defendant. And, where two parties had previously had words, and a general challenge to fight passed, and three hours afterwards, the defendant, belonging to one of them renewed the challenge, which was accepted, and a fight ensued, which resulted in the death of one of the other party, it was held murder.¹ Where it appeared that the deceased had threatened the prisoner, about three weeks before, that he would kill him, that they met in the street, on a star-light night, when they could see each other, that the deceased pressed for a fight, but the prisoner retreated a short distance, that when the deceased overtook him the prisoner stabbed him with some sharp instrument which caused his death, and that, at the time of this meeting, the deceased had no deadly weapon, it was held, that the offence was murder.²

When the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, unless there is evidence to repel it. There must be some evidence to show that the wicked purpose had been abandoned.³

Although a person may not go in search of, or lie in wait for another, whom he kills, yet, if he has formed the purpose to kill him, and within a short time after forming and avowing such purpose, he duly armed, meets the other by chance, whether in public or in secret, and slays him immediately, there is a serious presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose.⁴

If a person upon meeting his adversary unexpectedly, who had intercepted him upon his lawful road, and in his lawful pursuit, accepts the fight where he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way; and it will be manslaughter.⁵

If one seek another, and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him, if a homicide ensue, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express.⁶ So, if A from previous angry feelings, on meeting with B, strike him with a whip, with the view of inducing B to draw a pistol, or, believing he will do so, in resentment of the insult, and determines, if he do so, to shoot B as soon as he draws, and B does draw, and A immediately shoots and kills B, this is murder.⁷

If the deceased is approaching the prisoner's path, with the intention of assailing the prisoner, and becomes irresolute and stops or abandons his intention, leaving the prisoner with full liberty to pass, and the prisoner with a design of slaying the deceased, brings on the attack, the killing will be murder in the first or second degree according to circumstances; if the killing were from the old grudge, and a

¹ Com. v. Crane, Gen. Ct. of Virginia, Nov. 1791, 2 Wheeler's C. C. 587.

² State v. Scott, 3 Ired. 409.

³ State v. Johnson, 1 Ired. 354; State v. Tully, 4 Ired. 424.

⁴ State v. Tilley, 1 Ired. 424.

⁵ Copeland v. State, 7 Hump. 479.

⁶ State v. Lane, 4 Ired. 113; 1 Hale, 451; State v. Ferguson, 2 Hill's S. C. R. 619.

⁷ State v. Marten, 2 Ired. 101.

previously premeditated intention, it would be murder in the first degree; but if it were from malice suddenly produced by the sight of his enemy, and without premeditation, it would be murder in the second degree.¹

Though there had been a quarrel between A and B and a reconciliation between them, and afterwards, upon a new and sudden falling out, A kills B, this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeited and that the hurt done was upon the score of the old malice, it is murder.²

The prisoner with the deceased and another brother, and some neighbours, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgel by agreement. All this time no token of anger appeared on either side, till the prisoner, in the cudgel-play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest: but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reprovved for using such expressions, he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body." The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him into the company: but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you, t and off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defen-

¹ Copeland v. State, 7 Humph. 479.

² 1 Hale, 451.

dant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case showed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon: but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off; but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second: but he advanced as fast, and took the revenge he had vowed. The case was held to be murder.¹

The principle already referred to as of general application, bears particularly upon this particular class of cases, viz., that *in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill or do some great bodily harm, such homicide will be murder.* Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder: for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savoured of cruelty.²

Where a sufficient legal provocation at the time to extenuate the homicide is proved, it is not competent for the prosecution, in order to show that the act of killing was not by reason of the immediate provocation, but of a pre-existing malice, to prove that a year before the prisoner declared his intention to kill two or three men, it being admitted that the deceased was not one of the men referred to.³

(9.) When a third party interferes in the combat of others.

When such interference is from malice, and not from mere wantonness, the party so assailed is guilty of murder. Thus, if a master, maliciously intending to kill another, take his servants with him without acquainting them with his purpose, and meet his adversary, and fight with him, and the servants, seeing their master engaged, kill the other, they would be guilty of manslaughter only, but the master of murder.⁴ If otherwise, it would be murder in all.

Where the third party interferes from hot blood alone, and kills one of the combatants, this is mere manslaughter: though if A and B fight upon malice, and C, the friend or servant of A, not being acquainted therewith, come in and take part against B, and kill him,

¹ Mason's case, Post. 132.

² Halloway's case, Cro. Car. 131; Palm. 545; 1 Hawk. P. C. c. 39, s. 42; W. Jones, 198; 1 Hale, 453; Kel. 127; 1 East, P. C. c. 5, s. 22, p. 237; State v. Ferguson, 2 Hill's S. C. R. 619.

³ State v. Barfield, 7 Ired. 299.

⁴ 1 Hawk. P. C. c. 31, s. 55.

this (though murder in A) is only manslaughter in C: yet it would be otherwise, if C had known that the fighting was upon malice, for then it would be murder in both. If A, having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*: but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. And the law is the same in the case of the master killing the other in defence of the servant.¹

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend.² But it must be intended that the two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray or striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man be killed by the person so meddling.³

A distinction has been taken between the interference of servants and friends, and that of a mere stranger, yet the basis of this distinction does not appear to be any where actually defined. And it has been observed, that the nearer or more remote connexion of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction.⁴

If a third person should take up the cause of one who has been worsted in mutual combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter. A and B were walking together in Fleet street, and B gave some provoking language to A, who, thereupon, gave B a box on the ear, upon which they closed, and B was thrown down, and his arm broken. Presently B ran to his brother's house, which was hard by; and C, his brother, taking the alarm, came out with his sword drawn, and made towards A, who retreated ten or twelve yards; and C pursuing him, A drew his sword, made a pass at C, and killed him. A being indicted for murder, the court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A made the first breach of the peace by striking B; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C than to avoid him; and accordingly, at last, it was found manslaughter.⁵

¹ 1 Russ. on Cr. 590.

² 12 Rep. 89.

³ 1 Russ. on Cr. 592.

⁴ 1 Russ. on Cr. 592.

⁵ 1 Hale, 482.

6th. Restraint or coercion.

It has been already shown that an illegal attempt to restrain a man's liberty, even under colour of legal process, is such provocation as to reduce the offence to manslaughter. This holds where a man is injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword, to prevent him from escaping while he sent for a bailiff to arrest him. Or, as where a sergeant put a common soldier under arrest, who thereupon killed the sergeant with a sword, and upon the trial the articles of war were not produced, nor any evidence given of the usage of the army, and so no authority in the sergeant appeared.¹

Two soldiers came at eleven o'clock at night, to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer; and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken; more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with.²

The same doctrine was held in a case where a sergeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisting; and whilst the sergeant had hold of him to force him, he drew the sergeant's sword, plunged it into his body, and killed him. The sergeant had no right to make the arrest, except under the articles of war; and the articles of war were not given in evidence. Buller, J., considered it in two lights: first, if the sergeant had authority; and, secondly, if he had not, on account of the coolness, deliberation, and reflection, with which the stab was given. The jury found the prisoner guilty: but the judges were unanimous, that the articles of war should have been produced; and, for want thereof, held the conviction wrong.³

¹ Buckner's case, Styl. 467; Wither's case; R. v. Curwan, 1 Moody, C. C. 132. See ante, 48.

² R. v. Willoughby, 1 East, P. C. 288.

³ Wither's case, 1 East, P. C. 233.

7th. Duelling.

Homicide in a duel is murder in the guilty party, and this though the latter had received the provocation of a blow,¹ or had been threatened with dishonour.² Nor does it make any difference at common law that his intention was not *to kill*, but to *disarm*, his adversary.³ It is the deliberation which constitutes the grade of guilt. Thus if A and B meet deliberately to fight, and A strike B, and pursue B so closely that B, in safeguard of his own life, kills A, this is murder in B; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done.⁴

If the meeting to fight be intentional, no subsequent hot blood will be a defence. Thus where B challenges A, and A refused to meet him, but in order to evade the law, A told B that he should go the next day to a certain town about his business, and accordingly B met him in the road to the same town, and assaulted him, whereupon they fought, and A killed B, it is said that A seems guilty of murder; but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B such information accidentally, and not with a design to give him an opportunity of fighting.⁵ For in truth the duellist has engaged in an act, highly unlawful, in defiance of the laws, and he must at his peril abide the consequences; and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought; the circumstance was relied on as showing that he did not fight in the first passion.⁶ On the other hand, where upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them be killed, it will be but

¹ *R. v. Young*, 8 C. & P. 144; *Smith v. State*, 1 Yerger, 228; *R. v. Cuddy*, 1 Car. & Kir. 209.

² 1 Hale, 452.

³ 1 Hawk. P. C. c. 31, s. 21. See ante, p. 41.

⁴ 1 Hale, 452, 480, who says, "Thus is Mr. Dalton, cap. 93, p. 241, (new edit. c. 145, p. 471,) to be understood." But a *qu.* is added in 1 Hale, 452, whether, if B had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A refusing to decline it, had attempted his death, and B after this had killed A in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A to kill him, it would be murder. This *quere* of Lord Hale's is discussed in 1 East, P. C. c. 5, s. 54, p. 284, *et seq.*, and it is observed that Mr. J. Blackstone, (4 Blac. Com. 185,) expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the Chief Justice, in Oneby's case. (Lord Raym. 1489.) Mr. East, after reasoning in favour of the extenuation of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law." 1 East, P. C. c. 5, s. 54, p. 285.

⁵ 1 Hawk. P. C. c. 31, s. 22; 1 Hale, 453.

⁶ Bromwich's case, 1 Lev. 180; 1 Sid. 277; 7 St. Tr. 42. Bromwich was indicted for aiding and abetting Lord Morley in the murder of Hastings.

manslaughter, because it may be presumed that the blood never cooled.¹ It is to be supposed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard: therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence.²

This doctrine has been furthest pushed in the following: "Lord Byron and Mr. Chaworth differed at a club as to the best means of procuring game. Mr. C. mentioned Sir C. Sedley's manors; Lord B. asked which they were; Mr. C. named Nuttall and another; Lord B. repeated his question: Mr. C. said, "Surely you will allow Nuttall to be Sir C. Sedley's: but if you have any thing more to say, you will find Sir C. Sedley in Dean-street, and me in Berkeley-row." The conversation then dropped, and they stayed together at least half an hour: and Lord B., during that time conversed with a gentleman who sat next him: Mr. C. settled the bill, but made a mistake in marking the club room, which might arise from agitation; he marked Lord B. as absent, though he was there. Mr. C. then went out, and a Mr. Donston followed him, of whom Mr. C. asked if he had been short with Lord B. in what he said last to him; to which Mr. Donston answered "No," and was returning into the room when he met Lord B. coming out. Lord B., said to Mr. C., "I want to speak to you;" upon which they both called the waiter, and were shown into a small room, and the waiter left a candle in the room. Lord B. asked Mr. C. if he meant the conversation upon game to Sir C. Sedley or to him; upon which Mr. C. said, "If you have any thing to say, we had better shut the door, or we shall be heard;" and he shut the door. On turning from the door he saw Lord B.'s sword half drawn, and Lord B. said, "Draw, draw." Mr. C. drew, and thrust at Lord B.; and after one or two thrusts, Mr. C. received a mortal wound, of which he died. An indictment was preferred for murder; but upon the trial the peers were unanimous that it was manslaughter only.³

Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern; and on coming out Sir Charles P. and Mr. W. quarrelled and drew their swords, and Mr. W. ran Sir Charles P. through the body, and he died. There was no evidence of any unfair advantage taken by Mr. W.; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles P.'s body; and it appeared that the parties did not know each other before. When Sir Charles P. fell, Mr. W. took him by the nape of the neck, dashed his head upon the ground, and said, "Damn you, you are dead." Jenner, B., told the jury that this was only manslaughter; the jury, however, were disposed to find it murder, because of the dashing the head against the ground, &c.: but Allibone, J., repeated to them it was manslaughter only, and they found accordingly.⁴

But where malice is proved, the fact of combat is no defence, and malice may be inferred from the violence of the prisoner, and from

¹ 1 Hale, 453; 1 Hawk. P. C. c. 81, s. 29; ³ Inst. 51.

² Fost. 138, 296.

³ R. v. Lord Byron, 11 St. Tr. 1177.

⁴ R. v. Walters et al., 12 St. Tr. 113.

deliberation.* Thus in major Oneby's case—which is the leading one under this head, and has been already cited,—the evidence was that the prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard; when Rich, one of the company, asked if any one would set him three half crowns: whereupon the deceased, in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces; and the prisoner at the same time set Rich three half crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head; but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword: but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over:" and at the same time offered his hand to the prisoner, who made answer, "No, damn you; I will have your blood." After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, "Young man! come back; I have something to say to you;" whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked upon his death-bed, whether he received his wound in a manner among sword men called fair, answered, "I think I did." It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the argument of the Chief Justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under these circumstances the court were of opinion that the prisoner had had reasonable time for cooling: after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the de-

ceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether showed, such strong proof of deliberation and coolness, as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances: for it must have been implied, according to *Mauwgridge's* case, that he acted upon malice; having, in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him.¹

'Not only the *principals*, but the *seconds*, in a deliberate duel, are guilty of homicide.² And with regard to other persons who are so present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do any thing, yet if they are present and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder.³

In a case before Williams, J., in 1843, the indictment charged a person, named Munro, with the wilful murder of David Lynar Fawcett; and the prisoner, and two others, named Gulliver and Grant, were charged with being present, aiding and abetting Munro in the act. The death of the deceased, Colonel Fawcett, was shown to have occurred on the 1st of July, in a duel, at Camden Town, in which Lieutenant Munro was one of the principals, and the prisoner was said to have acted as the second of the deceased. The evidence as to the prisoner's identity was not very direct and positive. WILLIAMS, J., (ROLFE, B., being present,) in summing up, said—The question is, whether the prisoner was at the spot at the time, and whether he took such a part as amounts, in the language of this indictment, to an aiding and abetting of the principal offender. I am bound to tell you, as a matter about which my learned brother and myself have no doubt, (nor I believe, has any other judge any doubt about it,) that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting that death, will be guilty of abetting the principal offender. I give them no particular name, but say, that all persons who are present, aiding, assisting, and abetting that deliberate duel are within the terms of such an indictment as this. With respect to the facts, there is very little doubt, if any, that Colonel Fawcett was killed in a duel on the day mentioned in the indictment; and if the parties went out coolly and deliberately to fight the duel, then the killing by Lieutenant Munro will amount to murder; and then the question will arise, whether the prisoner at the bar was present at that time aiding, assisting, and abetting the combatants on that occasion. Lord Hale, though an exceedingly sound lawyer, considered that, as far as related to the second of the party killed, the rule of law had been too far strained; and seems to have doubted whether such second should be deemed a principal in the second degree. But, if this doubt were correct it might be suggested, on the same principle, that Colonel Fawcett

¹ R. v. Oneby, 2 Str. 766; 2 Ld. Raym. 1485.

² R. v. Young, 8 C. & P. 644.

³ Ibid.

was guilty of suicide. Such a course is straining the principles of law till they become revolting to common sense. After stating the evidence, his lordship left the case to the jury, who found the prisoner Not Guilty.¹

II. MISADVENTURE.

Under the general head of excusable homicide, the older text writers included homicide *per infortuniam*, or misadventure, which is the subject of this section, and homicide *se et sua defendendo*, which is the subject of the next. The term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, says Sir William Russell,² "that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them:³ and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out. At the present time, in order to prevent this expense, it is usual for the judges to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure, or by self-defence."⁴

In the United States, no penalty of any kind has ever been inflicted on excusable homicide; it having been the invariable practice for the court to direct the jury to acquit when this defence is made out.

Homicide by misadventure is where one without intention of bodily harm, and with all proper precaution against danger, while doing a lawful act, unfortunately kills another. To constitute this defence, three requisites exist:

- (1.) There must have been no intention to do harm.
- (2.) Proper precaution must have been taken to avoid mischief.
- (3.) The act must have been lawful.

- (1.) There must have been no intention to do harm.

If there was any malice in the matter the offence becomes murder.⁵ Thus a party, the head of whose hatchet accidentally flies off, (it having been properly secured,) and kills another, is guilty only of misadventure, unless there was intention to do harm; in which latter case it is murder.⁶

- (2.) Proper precaution must have been taken to avoid mischief.

Where a person was riding a horse, and the horse, being whipt by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse.⁷ Where, however, a similar accident occurred in consequence of a carter leaving his horse's head and sitting inside, it would be manslaughter,⁸ and such indeed is the law in all cases where there is any negligence.⁹

¹ R. v. Munro, 1 Car. & Kir. 209. ² 1 Russ. on Cr. 656. ³ 4 Blac. Com. 188.

⁴ Ibid.; Fost. 288.

⁵ 1 Russ. on Cr. 657.

⁶ 1 Hawk. P. C. c. 29, s. 2.

⁷ 1 Hawk. P. C. c. 29, s. 3.

⁸ Knight's case, 1 Lew. 168.

⁹ 1 Russ. on Cr. 650.

The question in such cases is, whether the street driven in is one so frequented as to make particular care necessary. If the latter be the case the offence would seem to be but manslaughter. Thus, A was driving a cart with four horses in the highway at Whitechapel, he being in the cart, and the horses being upon a trot, threw down a woman who was going the same way with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovell, held this to be only misadventure: but it was said by Lord Holt, that if it had been in a street where people usually pass, it would have been manslaughter.¹

Generally speaking, where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused.²

If workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, this will be misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given to such as might be below.³

Though where one lays poison to kill rats, and another takes it and dies, this is misadventure: yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might in some cases amount to manslaughter.⁴

The owner of a corn field, having deer frequenting his corn field, out of the precinct of any forest or chase, set himself in the night time to watch in a hedge, and set A, his servant, to watch in another corner of the field, with a gun charged with bullets, giving him orders to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself: and the servant, supposing it to be the deer, shot and killed the master. This was ruled, by Lord Hale, to be misadventure, on the ground that the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. It seemed, however, to Lord Hale himself, that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark.⁵ Mr. East, however, tells us upon this, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act; and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act.⁶ Where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being

¹ 1 East, P. C. c. 5, s. 38, p. 263. See ante, 112, 113.

² Fost. 263; 1 Hale, 476.

³ 1 Hale, 472; Fost. 262, ante, 145.

⁴ 1 Hale, 431; 1 East, P. C. s. 40, p. 266.

⁵ 1 Hale, 476.

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to distinguish his commander, under such circumstances, from an accident, it is but misadventure.¹

Each caution is necessary as is usual and ordinary in similar cases—some and the utmost caution cannot be insisted upon. Thus, if a man discharges a loaded pistol when he has reason to believe it is unloaded, and kill another, the weight of authority is that it is an accident. Thus, Mr. Justice Foster says, that accidents of an innumerable kind may be the lot of the wisest and best of mankind, most commonly fall amongst the nearest friends and relations; then proceeds to state a case of a similar accident, in which the defendant was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbours, to take a walk near the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in the friend's house. After dinner he went to church: and in the evening he returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a son belonging to the family privately took the gun, charged it, went after some game; but, before the service at church was over, he returned it, loaded, to the place whence he took it, and the defendant, who was ignorant of all that had passed, found it all as he had left it. "I did not inquire," says Mr. Justice Foster, "whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted."²

Here it appeared that the defendant being in bed and asleep in his house, his maid-servant, who had hired the deceased to help her with her work, as she was going to let her out about midnight, thought she heard thieves breaking open the door; upon which she ran up stairs to her master, and informed him thereof; who rising early and running down stairs with his sword drawn, the deceased met herself in the buttery, lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, conceiving she had been a thief, cried out, "Here they be that do us wrong." Thereupon the defendant ran into the buttery in a dark, not knowing the deceased, but taking her to be a thief, and striking with his sword before him, killed her. This was ruled to be misadventure.³

) The act must have been lawful.

Where deadly weapons are used in lawful games, the act itself is not unlawful.⁴ Lord Hale went so far as to hold that death, if it occurred in such sports and exercises as give strength, acti-

¹ Hale, 42. ² Foster, 265.

³ Level's case, Cro. Car. 438; 1 Hale, 42, 474.

⁴ Hale, 475; Foster, 289.

vity, and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling by consent, was manslaughter;¹ but such is not the law.² And certainly, as remarks a more recent writer, though it cannot be said that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and, though the weapons used be not of a deadly nature, yet if they may breed danger, there should be due warning given, that each party may start upon equal terms. For, if two be engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not to murder, the intent not being malicious.³

Where persons shoot at game, or butts, or any other lawful object, and a bystander is killed:⁴ and with respect to the lawfulness of shooting at game, it may be observed, that though the party be not qualified, the act will not be so unlawful as to enhance the accidental killing of a bystander to manslaughter.⁵

III. EXCUSE AND JUSTIFICATION.

Excusable homicide has already been considered, so far as concerns death, by *misadventure*. Among the older text writers, however, it was more generally treated as forming a distinct branch of the law of self-defence. It was held that where a man kills another in the course of a sudden brawl or quarrel, he may protect himself by making it appear, first, that before a mortal blow was given he had declined further combat; and secondly, that he killed his adversary through necessity. This species of homicide was termed *chance medley*, or *chaud medley*. As, however, the distinction between it and justifiable homicide in this country no longer exists,—in each case the practice being for an unqualified acquittal to be entered,—the two branches will be considered together under the following heads:—

1st. Repulsion of a felonious assault.

(1.) On person.

- (a.) What the nature of the assault must be.
- (b.) How far retreat is necessary.
- (c.) What certainty must exist as to felonious intent.
- (d.) By whom the right may be exercised.
- (e.) How far want of premeditation is necessary.

(2.) On property.

2d. Execution of the law.

3d. Killing of fugitives from arrest.

4th. Self-preservation in shipwreck.

¹ 1 Hale, 472.

² Fost. 260; 1 East, P. C. c. 5, s. 41, p. 268.

³ 1 East, P. C. c. 25.

⁴ 1 Hale, 38; 1 Russ. on Cr. 660.

⁵ 1 Hale, 475; Fost. 259; 1 Russ. on Cr. 660.

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t. Repulsion of a felonious assault.

(1.) On person.

(a.) What the nature of the assault must be.

ance medley is thus defined by Sir Wm. Russell:¹ "Homicide upon ce medley borders very nearly upon manslaughter; and, in fact experience, the boundaries are in some instances scarcely per- able, though in consideration of law they have been fixed. In

cases it is supposed that passion has kindled on each side, and s have passed between the parties; but, in the case of manslaugh- t is either presumed that the combat on both sides had continued e time the mortal stroke was given, or that the party giving such e was not at that time in imminent danger of death.² And the criterion between them is stated to be this; when both parties

actually combatting at the time the mortal stroke is given, the r is guilty of manslaughter; but if the slayer has not begun to , or (having begun) endeavours to decline any further struggle, afterwards, being closely pressed by his antagonist, kills him to d his own destruction, this is homicide excusable by self-defence."³

hen a man is assaulted in the course of a sudden brawl or quar- ne may, in some cases, protect himself by killing the person who lts him, and excuse himself on the ground of self-defence. But, der to entitle himself to this plea, he must make it appear, first, before a mortal stroke given he had declined any further combat; idly, that he then killed his adversary through mere necessity, der to avoid immediate death. Under such circumstances, the g will be excusable self-defence, sometimes expressed in the law e word *chance medley*, or (as it has been written by some,) *chaud ey*, the former of which, in its etymology, signifies a casual affray; after an affray in the heat of blood, or passion. Both of them are y much of the same import; but the former has, in common h, been often erroneously applied to any manner of homicide by dventure; whereas it appears it is properly applied to such kill- s happens in self-defence upon a sudden rencounter.⁴

o justify an acquittal on the ground of self-defence, the danger ave been actual and urgent,⁵ as will be presently seen more under a subsequent head. No contingent necessity will avail; when the pretended necessity consists of the as yet unexecuted inations of another, the defendant is not allowed to justify himself eason of their existence.⁶

hen an attack not in itself felonious is threatened, the rule ges. If one man deliberately kill another to prevent a mere ass on his property, whether that trespass could or could not be wise prevented, it is murder; and consequently, an assault with t to kill cannot be justified on the ground that it was necessary event a trespass on property.⁷ If such killing take place in the

Russ. on Cr. 661.

Blac. Com. 184.

S. v. Vigol, C. C. 2 Dallas, 346; Com. v. Crause, 3 Am. L. J. 399; People v. Doe, n. (Mich.) 451; Oliver v. State, 17 Ala. 537.

ople v. M'Leod, 1 Hill, N. Y. R. 377; State v. Morgan, 3 Iredell, 186.

ate v. Morgan, 3 Ired. 186; Com. v. Drew, 1 Mass. 304; Munroe v. State, 5 Ga. 95; v. State, 17 Ala. 588. See ante, 170.

² Fost. 275, 276.

⁴ Ibid.

passion and heat of blood, the killing is manslaughter, but under no circumstances can it be less. For the rule of law is, that where such trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do so, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the provocation: but if the injury be inflicted with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter, the law so far recognising the adequacy of the provocation arising from the trespass.¹ The rule, however, does not apply to any crime unaccompanied with force, as picking of pockets.²

(b.) How far retreat is necessary.

In cases of personal conflict in order to prove this defence, it must appear that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him.³

There may be cases sometimes occurring, though very rare, and of dangerous application, where a man, in case of personal conflict, may kill his assailant without retreating to the wall. The assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter, he would not escape if he could. Thus, if A assault B, so fiercely that giving back would endanger his life, (in such case it is agreed that the party thus attacked need not retreat in order to bring his case within the rule of necessity in self-defence,) or if, in the assault, B fall to the ground, whereby he could not fly, in such case if B kill A it is in self-defence upon chance-medley.⁴ In *Selfridge's case*,⁵ this proposition was relied upon by the court as the main principle of law in connexion with the issue, though perhaps an error was committed in stating it without the usual common law qualifications. Thus, as is said by Mr. East, if B, in the case already put, had returned A's assault so fiercely that he could not retreat without danger; or if A had fallen to the ground, and then had killed B who was aiming at his life, still this should not be interpreted to be done in self-defence upon chance-medley, because, it has been said, a fall not being voluntary as a flight is, it does not thereby appear that A declined fighting; and, therefore, B cannot safely quit the advantage he has gotten. So that in the case of the assailant there must be an actual unequivocal retreat and quitting of the combat as far as he can, in order to reduce the killing by

¹ *Com. v. Daley*, 4 Pa. L. J. 154; *Claxton v. State*, 2 Humph. 181.

² 1 Hale, 488.

³ 1 Hale, 481, 483; *State v. Wells, Cox*, 424; *U. States v. Travers*, U. S. Cir. Court, 2 Wheeler's C. C. 498, 507, per Story, J.; *R. v. Smith*, 8 C. & P. 160; *Oliver v. State*, 17 Ala. 587.

⁴ 1 Hawk. c. 29, s. 14; 4 Blac. Com. 185; 3 Inst. 56.

⁵ See *Selfridge's case*, ante, 171. Post, *Appendix*.

him to self-defence upon chance-medley, and this his intention must not be shown by any ambiguous or casual act, such as his falling; otherwise, as Lord Hale observes, all cases of murders or manslaughters would by interpretation be turned into self-defences. Nor in any case will a retreat avail, if it be feigned in order to get an opportunity or interval by parting to enable him to take advantage of this excuse. If there be any pause in the conflict, or any slowness in the defendant in neglecting any opportunity to withdraw from it, the offence becomes manslaughter; for it is not to be tolerated that the plea of necessity should be received when that necessity was the result of the defendant's own election.¹

Where, in the course of the quarrel, the prisoner was menaced by the deceased, whose strength was greater than his own, with a brick-bat, and could have escaped by flight, but not choosing to do so, turned round and mortally wounded his assailant with a dagger which he had concealed on his person, it was held manslaughter.²

If the attack of the deceased be for a moment desisted in, and the defendant, on his own part, renew the conflict, the killing is no longer excusable. Where, in a case in New York, the deceased had pursued the defendants, who were women, for some distance, till he stopped to tie his shoe, when one of them turned and gave him a mortal blow, it was held manslaughter; first, because the defendants were not pursued to the wall, and secondly, because the deceased had desisted temporarily from the pursuit.³

Where the prisoner was a lodger at a house to which there was a backway, of which the prisoner was ignorant, it being the first night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and ill treat him; Bayley, J., is reported to have said, "If the prisoner had known of the backway, it would have been his duty to have gone out backwards, in order to avoid the conflict."⁴ But it has been thought that the protection of the house extends to each and every individual dwelling in it, and it has been held that a lodger might justify killing a person endeavouring to break into the house where he lodged, with intent to commit a felony in it.⁵

(c.) What certainty must exist as to felonious intent.

There must be an intention on the part of the person killed to rob, or murder, or to do some extreme bodily injury to the person killing; or the conduct of the party must be such as to render it necessary on the part of the party killing to do the act in self-defence.⁶ And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him, it is manslaughter.⁷

¹ Fost. 277; 1 Hawk. c. 29, s. 17.

² People v. Anderson, 2 Wheeler's C. C. 408.

³ People v. Garrettson, 2 Wheeler's C. C. 348.

⁴ Dakin's case, 1 Lew. 166.

⁵ R. v. Cooper, Cro. C. 544; see 1 East, P. C. c. 5, s. 57, p. 289; Fost. 274, and Ford's case, Kel. 51.

⁶ R. v. Ball, 8 C. & P. 160; 9 C. & P. 22.

⁷ 1 Hale, 485; 1 Hawk. P. C. c. 28, s. 23; see State v. Zellers, 2 Halsted, 8 C. & P. 160.

No assault, however violent, will *justify* killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent. As a general rule, there cannot be an acquittal, unless there is reasonable evidence of such intent. This evidence, however, must be gauged by the defendant's opportunities at the time, and if he have reasonable grounds to believe a felony to be intended, it makes no matter that such was really not the case. Thus, if a man assaults another with a pistol in such a manner as to produce the belief that he is about to take life, it makes no matter whether the pistol was loaded or not.¹

It is manifest that very embarrassing questions will here arise, as to whether the test to be applied is the defendant's capacity, or the capacity of the jury trying the case. If the latter be the case, the question will be of comparatively easy solution. It will be only necessary for the jury to examine the *res gestæ*, and to determine whether, from them, a reasonable belief of an intended felony can be deduced. But if the defendant's capacity is to be taken as the standpoint, the inquiry is widely extended. In the first place, it involves the temperament, nervous and intellectual, of the defendant, as well as his means for physical resistance. In the second place, it involves the same qualities in the deceased, so far as they could have been supposed to have been known to the defendant at the collision.² For, adopting this point of view, it would be absurd to say that a child or an imbecile person would not have much greater reason to apprehend a felonious assault from an incensed lunatic who was darting towards him with the appearance of an assailant, than would the lunatic from the attack of the imbecile or child. And if we admit a distinction in this case, it would be difficult to refuse to receive evidence of the nervous and physical texture of the defendant and the deceased in all others.³ It is clear, however, that to do so would be to yield to a very dangerous latitude in the trial of a case which would not only require a departure from the established common law principle, that the deceased's character cannot be brought into controversy, (as will be presently more fully seen;) but would open a number of complicated side issues. Without intending, however, to hazard a solution how far the difficulties thus opened may be reconciled, it is sufficient for the present purpose to collect the cases which have arisen on this particular point.

The prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed: his father ordered him to go to bed, which he refused to do: whereupon a scuffle happened between the father and son. The deceased, who was then in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him and beat him; the prisoner lying upon the ground with his brother upon him, not being able to avoid his blows or make any escape from his hands, and as they were striving together, the prisoner gave his brother the mortal wound with a penknife. At a conference of all the judges after Michaelmas term, 1704, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity, so as to excuse the kill-

¹ 1 Rus. on Cr. 669; Wh. C. L. 2d edit. 390, ante, 171.

² See post, sects. v. vi., in this chapter, where the characters of the defendant and deceased are fully treated.

³ Ibid.

ing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to have intended to chastise him for his misbehaviour to his father; and to excuse homicide upon the ground of self-defence, there must always appear to have been such a degree of necessity as may reasonably be deemed inevitable.¹ At the conference in the above case Powell, J., put the case; if A strike B without any weapon, and B retreat to a wall, and there stab A, that will be manslaughter; which Holt, Chief Justice, said was the same as the principal case: and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, that the intent was death; and without there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. The question whether there was such "a plain manifestation" is to be tested by the *defendant's* disposition and temper, not that of the jury.²

Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon which Mr. Cope returned a bottle with equal violence;³ and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another, is not fit to be trusted with a dangerous weapon in his hand.³ There seems to have been good reason for Mr. Cope to have supposed that his life was in danger; and it was probably on the same ground that the judgment on Ford's case proceeded. Mr. Ford being in possession of a room at a tavern, several persons insisted on having it, and turning him out, which he refused to submit to; thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them: and this was adjudged justifiable homicide.⁴ For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems, (there being no compact to fight) that he would be justified in killing any one of the assailants in his own defence; because so unequal an attack resembles more a degree of assassination than of combat.⁵

It was said, in Selfridge's case, that when, from the nature of the attack, there is reasonable ground for a man to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. The principle has been pushed still further in Tennessee, where it has been ruled, that if a man, though in no danger of serious bodily harm, through fear, alarm, or cowardice, kill another, under the impression that great bodily injury is about being inflicted upon him, it is neither manslaughter nor murder, but self-defence.⁶ Perhaps, as illustrated by the learned judge who pronounced it, the doctrine given in Selfridge's trial is law, and when received with such qualification, together with the case in Tennessee, may be accepted as in accordance with the principles of the common law. The illustration given by Parker, J., shows that he limited the application of the principle to cases where

¹ 1 East, P. C. 277; Pierson v. State, 12 Ala. 149.

² Ibid.

³ Kel. 128, 129.

⁴ Ford's case, Kel. 51.

⁵ 1 East, P. C. c. 5, s. 47, p. 276.

⁶ Granger v. State, 5 Yerger, 459.

not only there is reasonable ground to believe that there is a design to destroy life, but where that reasonable belief is based, not on surmises or inferences, however intelligent, but on an actual, immediate and physical attack from the assailant. "A, in the peaceable pursuit of his affairs," he said, "sees B rushing rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A who has a club in his hand, strikes B over the head before, or at the instant the pistol is discharged, and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A. Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol?" It will be noticed, first, that B employed a weapon likely to kill, and accompanied it with menaces of killing; secondly, that the parties were in actual conflict at the time; and thirdly, that A used a weapon not in itself mortal. With such restrictions, the rule in *Selfridge's case* is the same with that which obtains in England, and is now the settled law of this country. Thus, in a case of great moment, it was said by the Supreme Court of New York: "A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance he opposes."¹ The right of resorting to force upon the principle of self-defence, it was laid down, does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury.² And so it has been held in North Carolina, that a belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately.³

It is admissible for the defendant to show threats or other circumstances of a recent character, which would tend to make a man of his character believe that his life was in danger.⁴

The extent to which the character of the deceased can be considered in such an issue, falls under a following section.⁵

The following opinions bear with peculiar force upon the question under examination:—"The statute," (of New York) says Marvin, J., "specifies the cases of justifiable homicide."⁶ By the second subdivision of that section, the homicide is justifiable when committed 'in the lawful defence of such person, or his or her husband, wife, parent, child, master, mistress, or servant, when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.' The charge is very nearly in the language of this section. It is argued, however, that if the prisoner did apprehend a design on the part of Brush, to do him some great personal

¹ *People v. M'Leod*, 1 Hill, 420.

² *People v. M'Leod*, 1 Hill, 377.

³ *State v. Green*, 4 Iredell, 409.

⁴ *Monroe v. State*, 5 Geo. 85; *People v. Shorter*, 4 Barb. 460.

⁵ 4 Post, sects. v. vi.

⁶ 2 R. S. 660, s. 3.

injury, and believed he was in great danger, he had then a right to act upon that belief, and take the life of Brush; although there was no actual imminent danger. In other words, if he believed in the danger, he had a right to act as though the danger was actually present, and the injury about to be inflicted upon him, and that the consequences of this mistaken belief must fall upon the deceased, and the prisoner must, in the eye of the law, stand entirely justified. Several particulars are to be noticed in this section, as applicable to the present case. The homicide, if justifiable, must have been committed in the lawful defence of the person of the prisoner, at a time when there was reasonable ground to apprehend a design to do him some great personal injury. Who is to judge of the reasonable ground to apprehend a design to do injury? The grounds must be made to appear on the trial, and the jury must be satisfied that they were reasonable grounds upon which to found an apprehension of a design to commit the felony, or to do some great personal injury. It is true the party assailed must, at the time, judge of the ground for his apprehension; but he judges and decides at his peril, so far as the question of entire justification is concerned. It will not do to hold that he who has taken the life of another is entirely justifiable when he acts upon unreasonable grounds of apprehension, though he may have acted upon an honest apprehension of a design, on the part of the person killed to commit a felony, or to do him some great bodily injury. In such a case, the crime might be only manslaughter, and that too of the lowest degree. But to justify the act of killing in such a case, would be to establish a rule for the security of human life, resting upon the uncertain apprehension of men who may act upon unreasonable and improbable grounds. The statute also adds this farther condition:—"And there shall be imminent danger of such design being accomplished." The language is here changed. The question no longer depends upon reasonable grounds to apprehend imminent danger, from which a belief may be formed.

"It is, to my mind, clear and explicit, and requires that there should be imminent danger of the commission of a felony or of some great personal injury. The man assaulted may have reasonable ground to apprehend a design on the part of his assailant to do him some great personal injury, and yet there may in fact be little or no danger of the accomplishment of the design. Suppose the party committing the assault was unarmed, and weak, and infirm as compared with the party assaulted, and this disparity of strength is such that the party assaulted is able to protect his person from injury. The imminent danger of accomplishing the design would not exist, and yet the design may have been fully formed and manifested in a way so as to leave no doubt of it. In such a case the killing of the assailant could not be justified.

"What is meant in the statute by "such design?" Does this language imply that a design to commit a felony, or to do some great personal injury, had been actually formed? If so, then a reasonable ground to apprehend a design, &c., as declared in the previous part of the section, is not sufficient; but there must be added to it not only the imminent danger, but the actual design. This is not the true construction of the language. If there is a reasonable ground to ap-

prehend the design, and there is imminent danger that such apprehended design will be accomplished, it is sufficient. The party assailed may have reasonable ground to apprehend a design on the part of the assailant to kill him, and he may be in imminent danger from the acts of the assailant, of being killed, and yet his assailant may not have formed the design to kill him or to do him great personal injury. His acts may, however, be such as actually to put the life of the person assailed in imminent danger. In such a case, the killing would be justifiable. I am satisfied that the legislature considered the common law carefully, and that they adopted it, in the section relating to justifiable homicide, and that they have thereby provided that a homicide shall not be justifiable unless there was, first, reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury; and, secondly, there was imminent danger of such apprehended design being accomplished; that is, that there was imminent danger that a felony would in fact be committed, or that some great personal injury would be inflicted, unless the party was arrested by death. If I am right in this construction of the statute, the charge of the learned justice was in strict accordance with the law."

"When one who is without fault himself," said Bronson, J., when the same case was in the Court of Errors, "is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I cannot better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice Parker, of Massachusetts, on the trial of Thomas O. Selfridge. 'A, in the peaceable pursuit of his affairs, sees B walking rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his hand, strikes B over the head, before, or at the instant the pistol is discharged; and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A.' Upon this case the judge inquires, 'Will any reasonable man say that A is more criminal than he would have been if there had been a ball in the pistol? Those who hold such doctrine must require, that a man so attacked, must, before he strikes the assailant, stop and ascertain how the pistol was loaded; a doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehensions, no danger can be supposed to flow from this principle.'

The judge had before instructed the jury, 'that when from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.' To this doctrine I fully subscribe. A different rule would lay too heavy a burden on poor humanity. I have stated the case of *Selfridge* the more fully, because it is not only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question. I shall not stop to consider the common law distinctions between justifiable and excusable homicide; because our statute has placed killing in self-defence under the head of justifiable homicide.² The Massachusetts case lays down no new doctrine. The same principle was acted on in *Levett's* case, recited by Jones, J., in *Cook's* case,³ to the following effect. *Levett* was in bed with his wife, and asleep, in the night, when the servant ran to them, in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down, and was searching the entry for thieves, when his wife espying some one whom she knew not in the buttery, cried out to her husband in fear, 'Here they be that would undous.' *Levett* thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting his rapier before him killed *Frances Freeman*, who was lawfully in the house, and wholly without fault. On these facts, found by special verdict, the court held, that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here, the defendant acted upon information and appearances, which were wholly false, and yet as he had reasonable grounds for believing them true, he was held guiltless. *Foster*⁴ says of this case, 'Possibly it might have been better ruled manslaughter at common law, due circumspection not having been used.' I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in *Levett's* case; and most of them have fully approved it. East in his *Pleas of the Crown*,⁵ has done so. *Hale*⁶ mentions it among cases where ignorance of the fact will excuse from all blame. *Hawkins*,⁷ says the killing has not the appearance of a fault. *Russell*⁸ approves the decision, which he introduces with the remark, that 'important considerations will arise in cases of this kind, (he was speaking of homicide in defence of one's person, habitation or property) as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no design existed. *Roscoe*⁹ says, 'it is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are

¹ *Selfridge's* trial, p. 160; 1 Russ. on Cr. 699, ed. of '24; p. 485, note, ed. of '36.

² 2 R. S. 660, s. 3.

⁴ *Crown Law*, p. 299.

⁶ 1 P. C. 42, 474.

⁸ 1 Russ. on Cr. 550, ed. of '36.

³ Cro. Car. 538.

⁵ Vol. i. p. 274, 375.

⁷ 1 P. C. 84, *Carwood's* ed.

⁹ *Crim. Ev.* 639.

such as that; after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified.' And he then gives *Levett's* as an example.

"The case of Sir William Hawksworth, who through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle.¹ Other cases are put in the books, where the killing will be justified by the appearances, though they afterwards proved false. A general, to try the courage or vigilance of his sentinel, comes upon the sentinel, in the night, in the posture of an enemy, and is killed. There the ignorance of the sentinel, that it was his general, and not an enemy, will justify the killing.² The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn, in obedience to his master's orders, belongs to the same class.³ In Hampton's case,⁴ the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as he supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster⁵ calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution, the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still the case goes on the ground that the degree of guilt may be affected by appearances which afterwards prove false; for if he had not tried the pistol, it would have been murder. Foster⁶ mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge being of opinion that the prisoner had reasonable ground to believe the gun was not loaded, directed the jury, that if they were of the same opinion, they should acquit the prisoner; and he was acquitted. In Meade's case,⁷ the prisoner had killed with a pistol one of a great number of persons, who came about his house in the night time, singing songs of menace, and using violent language. Holroyd, J., told the jury, that if there was nothing but the song, and no appearance of violence, if they believed there was no reasonable ground of apprehending danger, the killing was murder. And in the *People v. Rector*,⁸ Cowen, J., said, alarm on the part of the prisoner, on apparent though unreal grounds, was pertinent to the issue. In the *U. S. v. Wiltberger*,⁹ the judge told the jury, that for the purpose of justifying the killing, the intent of the deceased to commit a felony must be apparent, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added, that the danger must be imminent; meaning undoubtedly, that it must wear that appearance. The *State v. Willis*,¹⁰ is entirely consistent with this doctrine. The Supreme Court of Ten-

¹ 1 Hale, P. C. 40; 1 East, P. C. 275; 1 Russ. on Cr. 549.

² 1 Hale, P. C. 42; 1 East, 275; 1 Russ. 540.

³ 1 Hale, P. C. 40, 476; 1 Russ. 540.

⁴ Kel. Rep. 41.

⁵ Crown Law, 263, 264.

⁶ Fost. 265.

⁷ 1 Lewin's Cr. C. 184.

⁸ 19 Wend. 569.

⁹ 3 Wash. C. C. 515, 521.

¹⁰ 1 Cox, N. J. Rep. 424.

nessee, has gone still further, and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground, in the appearances for the killing.¹ This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

"We have been referred to two cases where it was said, in substance, that the killing must be necessary;² and other authorities to the same effect might have been cited. The life of a human being must not be taken upon slight grounds; there must be a necessity, either actual or apparent, for the killing, or it cannot be justified. That, I think, is all that was meant by such remarks as have been mentioned.

"The unqualified language that the killing must be necessary has, I think, never been used when attention was directed to the question whether the accused might not safely act upon the facts and circumstances as they were presented at the time. I have met with no authority for saying, that a homicide which would be justifiable had appearances proved true will be criminal when they prove false.

"But it is said that our statute has changed the rule of the common law on this subject; and that there must in fact be danger of great bodily harm, or the killing cannot be justified. We know that such a change was not intended by the revisers, for they said in their notes, that the provision was 'according to the views of most of the writers upon the subject, and the express decisions in Massachusetts and New Jersey.' Those writers and decisions have already been noticed. As I read the statute, it affirms the rule in common law. The words are, homicide in self-defence is justifiable 'when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.'³ The words 'imminent danger' in the last branch of the clause, do not mean, as the argument for the prisoner assumes, that there must in fact be an impending evil which is ready to fall; but only that there is a threatened evil, or one which appears as if it were ready to fall. There must be reasonable ground to apprehend a wicked design, and apparent danger that such design will be accomplished. It is enough, by the express words of the statute, that there is reasonable ground to apprehend a wicked design; and it is absurd to suppose that such a provision was immediately followed by another, that the danger of the apprehended design being accomplished, must be actual, and not merely apparent. Such a construction would make the last part of the clause nullify the first, for if there must be actual danger that the design will be accomplished, there must of necessity be an actual design to be accomplished."⁴

In a late case in Ohio the following opinion was delivered. "The fifth error assigned is, that the court erred and misdirected the jury in the charge delivered to them as to the law of homicide in self-defence, and in refusing certain charges asked by the accused. The

¹ Grainger v. The State, 5 Yerger, 459.

² R. v. Smith, 8 Car. & Pa. 160; and R. v. Bull, 9 id. 22.

³ 2 R. S. 660, s. 3, sub. 2.

⁴ Shorter v. The People, 2 Coms. 197—202, Bronson, J.

charge complained of was in these words, 'The homicide in self-defence, which is considered as excusable rather than justifiable, is that, whereby man may protect himself from an assault in the course of a sudden casual affray by killing him who assaults him. In such a case, however, the law requires of the party, to have quitted the combat before a mortal wound shall have been given, if in his power to retreat, as far as he can with safety, and at last to kill him from mere urgent necessity, for the preservation of his life, or to avoid enormous bodily harm. If the person killing was not in any supposed or real imminent danger of his own life, or of enormous bodily harm, and if the jury found that the prisoner could not reasonably apprehend from the deceased, and did not so apprehend any danger of his own life or of enormous bodily harm, then the killing is not excusable homicide.' It is not denied that this charge has a great weight of authority in its support. Indeed it was more lenient to the accused than the doctrine of many adjudicated cases, in this, that it makes the homicide excusable, if the slayer had reasonable cause to apprehend, and did apprehend danger to his life or great bodily harm, although such danger may not in such case have existed. And the court, at the prisoner's request, also charged, that the law does not measure merely the degree of force which may be employed by a person attacked, and that if he employ more force than necessary he is not responsible for it, unless it is so disproportioned to his apparent danger as to show mere wantonness, revenge, or a malicious purpose to injure the assailant. But the part of the charge which seems to be objected to, is, that which relates to the necessity of quitting the combat, if it could be done with safety, before taking the life of the assailant; and it is urged that the law in Ohio is, that a person assailed may, in all cases without retreating take his assailant's life, if he reasonably believe it necessary to do so, in order to save his own life, or to avoid great bodily harm; and this, although he could, without increasing his danger retire, and thereby escape all necessity of slaying his adversary. As to what is the precise state of the law on this subject there is some diversity of opinion among the members of this court, and, therefore, without attempting at this time, to lay it down, we prefer to dispose of the case upon a view which is satisfactory to us all. And we do this more willingly because there is not a full bench sitting upon the case. Whether the person assaulted is or is not bound to quit the combat, if he can safely do so before taking life, it will not be denied in order to justify the homicide he must, at least, reasonably apprehend the loss of his own life or great bodily harm; to prevent which, and under a real, or at least supposed necessity, the fatal blow must be given. And again, the combat must not have been of his own seeking, and he must not have put himself in the way of being assaulted, in order that when assaulted and hard pressed, he might take the life of his assailant. It will also be admitted, that in a criminal, as well as a civil cause, before the judgment can be reversed for error in the charge to the jury, it must appear that some evidence was given tending to prove a state of case in which the charge would be material. If the charge was upon a mere abstract question of law, that could not arise upon the testimony, and could not influence the decision of the jury, its character, however

erroneous, furnishes no ground to reverse the sentence. And such we are clearly of opinion was the case under consideration. We find no evidence tending to prove that Stewart, when he slew Dotey, was in danger of loss of life, or limb, or great bodily harm, or that he apprehended such danger. Were there any evidence, however slight, tending to show that he really believed such danger to exist, we would feel bound to decide upon the correctness of the charge complained of; but we see no such testimony. And we are equally satisfied that the combat did not occur without blame on his part. On Sunday, the day previous to the murder, he showed George Huff the knife with which he afterwards killed Dotey. It was a very deadly weapon, the blade of which opened with a spring. He opened it, and prepared it for use by greasing it, and said that if he had *had* it the night before, when he was attacked, he did not think that Dotey would have got out of the bar room safe; and that if Dotey even attacked him again, he or any of the crowd that was with him, he would cut his d——d guts out. On the same day he made similar declarations to the witness Beall, and showed him the knife, and told him he intended to carry it; and ask Dotey for the money whenever he saw him again, and if he attempted to whip him he would cut his d——d guts out; and that he would dun him every time he met him. He made similar statements to Pierson Spinning, Monday morning. The affray took place just after supper Monday evening. John Huff testified that 'before supper that evening, I was sitting on the bench by the bar room door, and Stewart said to me, John, there will be war here to-night. I thought he referred to the military that were coming in town, and replied, that I reckoned not. Stewart replied yes, he guessed there would be war, and that McCartney and Dotey were coming down there to whip him if he asked them for the money they owed him, and he said he intended to ask them for it. Shortly after supper Stewart came out of the hotel, his boarding house, and saw Dotey and McCartney standing on the pavement. Dotey was leaning against a post. Stewart came forward to near where he was standing, and said, John and Jim, I want to know if you are going to pay me the money you owe me. Dotey told him to go away about his business, he did not want any thing to do with him, or to say to him. Stewart replied, that he had paid for Dotey's dinner, and he ought to be man enough to pay for that. Dotey said he had meant to pay, but Stewart had acted so meanly in dunning him in the street at every opportunity that he did not intend to pay. Stewart said he had asked him for it in private. Dotey denied it. Stewart reaffirmed his statement, and Dotey replied it's a lie. Stewart rejoined, "It's a damned lie," or "You are a damned liar." Dotey said, "I won't take that," and advanced towards Stewart with his hand raised to strike him, and struck at him. Stewart did not move, and as soon as Dotey came within his reach, he stabbed him, and repeating his blows gave him five stabs, one in the abdomen which severed the intestines, one in the back, two through the left arm, and one between the shoulder blade and ribs. Dotey cried out, "Take him away, he has a knife." They were then separated by some of the bystanders, and Dotey afterwards died of the wounds. Stewart received no injury, except a cut in his hand, made by his own knife no doubt. When Dotey started towards Stewart, they were but a

few feet apart, and the conflict lasted but a few seconds. It does not appear that Dotey had any weapon; he certainly attempted to use none. Stewart neither showed his knife, nor said that he had one before using it. He appears to have concealed it from Dotey until he gave the fatal stabs. Now it does seem clear to us that Stewart sought to bring on the affray, that he desired to be assaulted, and intended, if assaulted, to make good his previous threats of using his knife. True, he had a right to dun Dotey for his money, but he had no right to do so for the purpose of bringing on an affray in order to afford him a pretext to stab his enemy. There is some testimony tending to prove that Dotey went to the hotel that night to whip Stewart. It is not impossible that such was the fact; but if so, and the combat was mutual, the case is no better for the accused. Again, it does not appear that Stewart was at any time in danger of a serious injury, or that he apprehended it. There is no testimony tending to prove either the danger or the belief of it. We have next to consider the refusal to charge as requested by the accused. He asked the court to direct the jury, "that if a man is attacked by a person of strength superior to his own, he is not bound to flee, but may use such force and such weapons as may be necessary to resist the force employed against him, and if the assailant is killed, it is neither murder in the first or second degree, or manslaughter." Which instruction the court refused to give. As to so much of this instruction as relates to the necessity of retreating, it was immaterial for the reasons we have given. As to the residue of the instruction, if it had any application to the case, it amounted in substance to this, that Stewart, when assailed by an unarmed man, might repel the assault by the use of a deadly and concealed weapon, even though it might have been as well resisted by other means. The court were not asked to tell the jury that a man in his defence may employ sufficient force to repel the assailant. That they had already charged. But they were asked in effect to say, that he may employ any weapon sufficient for that purpose. If this is so, a man upon whom any ordinary assault and battery is committed, may pierce his assailant with a sword, or knock him down with an axe, for each of these is a weapon sufficient to resist the force employed. We do not think such is the law. The court were also asked to instruct the jury: "that if the killing arose from previous malice on the part of the defendant, and not from what occurred on the evening of the 9th of September, 1850, he cannot be convicted as indicted;" which charge was given with the following modification: strike out "previous" and insert "deliberate and premeditated," in the place thereof. The charge as asked, if we understand it, was, in effect, that if the jury found the crime was murder in the first degree the prisoner could not be convicted under the indictment, which only charged murder in the second degree; and the amendment of the court only made the proposition clearer. If there were error on this point, it was in giving the charge at all. But the accused cannot complain of this, as it was in his favour. The accused also asked the court to charge the jury that, "In this state any man has a constitutional right to carry weapons for self-defence, and hence there is no presumption of malice from the carrying of a weapon, such as the knife with which James R. Dotey was killed,"—which charge was

given with the following modification: "That the jury may and ought to take into consideration the manner by which, and purposes for which the prisoner had the possession of the knife in question." This modification was excepted to, but we see no error in it. The following charge was also asked by the accused:—"That if the defendant had reasonable ground to apprehend danger to his life, or great bodily harm, he would have the same right to defend himself, whether there was actual danger or not;" which charge was declined on the ground that the court had already charged on the same point. It was true that the court had so charged, and substantially as prayed for in the above instruction. We suppose it was not erroneous to refuse to repeat the charge. The next assignment of error is, that "The verdict of the jury is without evidence, and contrary to the evidence in the case." If we consider this assignment at all, it is sufficient to say that the verdict was not without evidence nor contrary to the evidence; certainly not grossly so. It is next assigned for error that, "the verdict of the jury is against law." We do not think so. The last assignment is, that "the court erred in overruling the motion for a new trial." The grounds upon which a new trial was asked were the same we have above considered. In our opinion the motion was properly overruled.¹

"The prisoner in this case," said Green, J., in a case in Tennessee, "is a free man of colour. He was indicted in the Circuit Court of Wilson county, for the murder of Stephen, a slave of M. A. Price, and was convicted of murder in the second degree, and sentenced to ten years' imprisonment in the penitentiary, from which judgment he appealed to this court. In the part of his honour's charge to the jury, in which he treats of the question of self-defence, he says, 'This brings us to the inquiry, whether at the time the prisoner shot and killed the deceased, he had reasonable evidence to believe the deceased would kill him or do him such great bodily harm, which might probably endanger his life.' Treating of manslaughter, his Honour says, 'If the jury should believe that the deceased was advancing upon the prisoner with a stick, threatening to beat him, and such assault excited in the prisoner a sudden burst of passion, and for the time being dethroned his reason; and he shot, and killed in this whirlwind of passion, it would be manslaughter.' We are of opinion, his Honour stated both these propositions too strong against the prisoner. In the first place, the court ruled, that, in order to excuse the killing, 'the prisoner must have had reasonable ground to believe that the deceased would kill him, or do him such great bodily harm, which might probably endanger his life.' And to place beyond doubt, that the court meant to impress the concluding sentence in this quotation upon the jury, as an indispensable ingredient in the definition of excusable homicide in self-defence, his Honour repeats the language, or the idea, several times, in the charge to the jury. The principle as laid down in all books, is thus stated by Roscoe:— 'Whether a person who is assaulted by another will be justified in using, in the first instance, such violence in his resistance as will produce death, must depend upon the nature of the assault, and the

¹ *Stewart v. State*, 1 *McCook's Ohio Rep.* 71.

circumstances under which it was committed. It may be of such a character that the party assailed may reasonably apprehend death, or great violence of person.¹ We think the court, in this case, has stated the principle more strongly than the authorities warrant. 2. In the second extract, in reference to manslaughter, his Honour seems to us, to speak of the 'dethronement of reason' and the 'whirlwind of passion,' in a way calculated to mislead. The books say, Whenever death ensues from sudden transport of passion, or heat of blood, if upon reasonable provocation, and without malice, or upon sudden combat, it will be manslaughter.² There must be sudden passion, upon reasonable provocation, to negative the idea of malice; but we think, the manner in which his Honour repeats, several times in his charge, that reason must be 'dethroned,' and there must be a 'whirlwind' of passion, in order to mitigate a killing to manslaughter, was calculated to exclude from the jury the possibility that a sane man, having sense and reason, could excite by anger, and heat of blood, be guilty of manslaughter. We think, therefore, that the impression his language was calculated to make on the minds of the jury, was erroneous. As to the facts of the case, it is unnecessary for us to speak; and as the prisoner must go before another jury, we deem it most proper to leave the case to their unbiassed determination. Reverse the judgment and remand the prisoner for another trial."³

In a late capital trial in Pennsylvania,⁴ where the killing being admitted, the defendant contended that the act had been done to save his own life, from a furious attack of the deceased. The court, for the purpose of aiding in the discovery of the *character* of the homicide, permitted the defendant to prove the general character and disposition of the deceased, as a quarrelsome, fighting, vindictive, and brutal man of great physical strength, rejecting, however, evidence of *particular instances* of his *brutality* in fighting, &c. It was at this time in evidence that the parties had a violent contest on the day previous to the alleged killing, and that the defendant was then saved from very considerable injury and perhaps death, only by the interference of a third person. Judge Conyngham charged the jury at great length, explaining the several degrees of homicide, of which under the indictment, the defendant could be convicted, and the legal distinction between the several offences. He told them that the killing being admitted, the act could not be *justified*, but that the defendant could be acquitted, if the jury believed the taking of the life was *excusable*, under the principles of law to be laid down to them. Upon this point of the case, he said:—"When an assault is made upon another with a manifest intent to take life or to do great bodily harm, and the party assailed, has *no means* of escape, either from the situation in which he is placed, or the sudden violence of the attack, he may take the life of the assailant to save his own. In the words of the judge in *People v. M'Leod*,⁵ 'a force, which the defendant has a right to resist, must itself be within striking, (or I should say also, *attacking*) distance: it must be menacing and appa-

¹ *Crim. Ev.* 639; 1 *East*, P. C. 243; *Fost.* 296.

² 1 *East*, P. C. 232; *Fost.* 313; *Roscoe's Crim. Ev.* 557.

³ *Young v. State*, 11 *Hump.* 200, &c.

⁴ *Com. v. Seibert*, *Luzerne co., Jan.*, 1852.

⁵ *Cited Whar. C. L.* 260.

rently able to inflict physical injury, unless prevented by the resistance he opposes.”¹ As a general rule before a man can resort to the life-taking remedy, he must as the old books say, flee to the wall, or till he meet with some unreasonable hindrance or impediment, which prevents his further retreat; in his own house, however, a man is not bound to abandon his premises to the mercy of an assailant. In the present case if there was an attack of the deceased, violent, menacing, and accompanied by acts or declarations showing a deadly intent. As contended by the defendant’s counsel, the law would not require that the assailed party, in his own room, with no mode of backward egress or escape, should retire a step or two merely to the wall of this small room, if by this there could not only be no prospect of escaping an attack likely to take life or do serious bodily harm, but the step would probably expose the party the more to the danger of the assailant. The jury will remember that it is *necessity* which can alone excuse the homicide, and this can only be ascertained by the consideration of all the circumstances of the case as shown in the evidence; a light and trivial assault, not attended by menaces of personal violence calculated to induce a reasonable belief of the danger of death, or common bodily injury, will not excuse the taking of life, though it may reduce the offence to manslaughter. Provocation, by mere words, not accompanied by *acts making*, or *menacing* an immediate assault, as has been already said, will not, when death is produced by the use of a deadly weapon, as in the present case, lessen the offence to manslaughter, nor will it do so in any case, where the provocation is only used to cover pre-existing malice and grudges.” The judge then referred to the evidence in detail, and then proceeded as follows:—“When you ascertain from the evidence the manner of the admitted killing, if you find it to have been done in defence of an attack by the deceased, in deciding upon the character of the offence, you are called upon to examine and revise every thing which goes to explain the true situation of the parties at the time; their respective feelings and intentions, shown by their acts, their threats and menaces, as may be proven; and you may consider, too, their relative characters as individuals, including their strength and physical ability. You may inquire, too, whether the deceased, making as is contended the first assault, was bold, strong, and of a violent and vindictive character, and the defendant much weaker and of a timid disposition, and how far their power was equalized by the weapons in the hands of the latter. Legal rules are general, but in their application, they must at times depend upon the special circumstances of particular cases. In the assault of a strong man upon a boy or a female, of a powerful individual upon a weaker, the necessity of taking life in self-defence under an ordinary attack will be more easily discoverable, than in an attack by one man upon another under more equal circumstances; the probable ability to defend without the fatal recourses, must depend upon the means and power of defence in the assaulted. Moral power too, is important in sustaining physical power. Timidity of disposition will never excuse rashness, and will not justify the creation or sustaining of imaginary fears, so as to excuse the taking of the life of another,

¹ See, also, to the same point, *Oliver v. State*, 17 Ala. 587.

but we say now, as we had occasion to say in this court some years since, upon the trial of Joseph Davis, that the jury may, in deciding upon the degree or kind of homicide, the nature of the attack and the necessity of the defence, consider this ingredient in the character of the slayer, as an adjunct to his proper physical power, or rather weakness. You are to look at the parties in this unhappy transaction in their relative knowledge of each other's character and strength, and to consider the circumstances attendant upon the contest of Saturday, their respective feelings and all the other circumstances, as already called to your notice; to inquire whether the defendant, as the evidence shows him *to be*, the man that *he is* and *was*, not as one of greater courage and strength may be, but as *he was*, when he did the act, had clear reason to believe, that in case of an attack upon him by the deceased, (the *man* that the evidence shows him to have been) he would be in danger of loss of life or common bodily harm; and if you do so find, and further that an attack, apparently of such intent and character, was made upon him, in a room described as this has been, with no other means of escaping the contest, as contended by the defendant's counsel, under the evidence, but by taking the life of the assailant; he would be excused in so doing, even though this, to him reasonable belief of the horrible result of such a contest should be produced partially by the constitutional timidity of his own character, doubly excited by the comparative weakness of his own bodily ability, proved in the contest with the assailant of the day previous. Look you into the heart of the defendant at the time of the transaction, search out his motives, as his acts and declarations show them, and say whether he, constituted as nature made him, and with all his means of defence, had reason to believe, and did believe, that he was in the serious danger above spoken of. We further say to you, that if under all the circumstances attending the transaction, there was no reason to believe that his person was in danger of death or common bodily harm, but that an ordinary battery was all that he had any reason to fear from the acts and declarations of the deceased, or that he had shot rashly and prematurely, when the mere presentation of his pistol, as argued here upon the part of the commonwealth, would have been fully sufficient to defend him from the attack, the provocation, connected even with the facts of the Saturday difficulty, would not free the defendant from crime in the eye of the law, but would reduce the offence to manslaughter. If, however, he shot the deceased under the influence of revengeful feelings and the grudge of the day before's quarrel, or without any new attack, or the danger heretofore referred to, standing either within or without the room, it would be murder, as we have already explained to you."

A quarrel arose between some soldiers and a number of keelmen at Sandgate; and, a violent affray ensuing, one of the soldiers was stripped, and a party of five or six came up and beat him cruelly. A woman called out from a window, "You rogues, you will murder the man!" The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and, on their pressing on him, he struck at them with the flat side of his sword seve-

ral times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes brandished his sword; and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but, before he passed, the soldier went to him, and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses, that if the soldier had not drawn his sword, they would both of them have been murdered. The judges were clearly of opinion that this was only manslaughter.¹

(d.) By whom the right may be exercised.

The right of self-defence in cases of this kind is founded on the law of nature, and is not, nor can be, superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force, and even his servant attendant on him, or any other person present, may interpose for preventing mischief, and if death ensue, the party so interposing will be justified.² And this principle applies with peculiar force to the relations of parent and child, and husband and wife.³

Where, in an affray, A knocked down B, and C, a bystander, believing the life of B to be in danger, B having retreated as far as he could with safety, gave B a knife to defend himself, to prevent further mischief, it was held that C was justified in giving B the knife.⁴

Under such circumstances, however, a person interposing, particularly if he be a stranger, should act with much caution. If, indeed, he interfere with a view to preserve the peace, and not to take part with either combatant, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable:⁵ but, in general, if there be an affray and an actual fighting and striving between persons, and another run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter.⁶

(e.) How far want of premeditation is necessary.

If it appear that the conflict was in any way premeditated by the defendant, the defence can no longer be set up.⁷ The law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not ficti-

¹ Brown's Case, 1 Leach, 148.

² Com. v. Daley, 4 Penn. L. Jour. 153; Selfridge's case, per Parker, J., 160; 1 East, P. C. 271; Com. v. Riley, Thacher's C. C. 471.

³ 1 Hale, 484; Bl. Com. 182 b; 1 Russ. 542.

⁴ Com. v. Riley, Thacher's C. C. 471.

⁵ 1 Hale, 484.

⁶ 1 East, P. C. c. 5, s. 58, p. 290; Johnson's case, 5 East, 660.

⁷ People v. McLeod, 1 Hill, N. Y. R. 577; Hayden v. State, 4 Blackf. R. 547.

tiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage.¹ The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or great bodily harm, and then, in his defence, he may kill his assailant instantly.²

The defence ceases to exist when it appears that the defendant, though originally in imminent danger, escapes, arms himself with a dangerous weapon, returns, and slays his antagonist. Thus, on the trial of Hare, one of the Kensington rioters, it was argued that there was no cessation of the mutual firing between the combatants, from the first onslaught; that Rice (the deceased) was acting with the original assailants, armed and engaged in the firing; and that he met his death in the resistance made to the murderous assault committed by himself and his associates, on the defendant and those united with him. "If it is true," said the learned judge, in charging the jury, "that the attack with deadly weapons on the meeting of the 7th of May, was instantly returned by those unlawfully assailed; that they continued it, in order to the preservation of their own lives, which, by no other practicable and reasonable means, could have been preserved, by reason of the sudden, fierce and deadly nature of the assault upon them; if Rice was engaged in this assault, and fell from the resistance of the assailed, rendered absolutely and indispensably necessary, from the suddenness, violence, and extent of the assault, a case of homicide in self-defence, and as such, justifiable in law, has been made out, and the defendant is entitled to an acquittal. But still, if the return of the fire was not an immediate act; if the proof shows that the assaulted party retired, armed themselves, returned to the scene of original violence, and there voluntarily, and without any necessity, in order to the preservation of their lives, renewed the combat, for the object of inflicting even, what they supposed, just chastisement on their opponents, the doctrine of self-defence has no relevancy to the case. The plea of self-defence rests on the natural right every man has to protect his own life against an unlawful assault upon it by another. If, however, when secure from danger, by his actual removal from the threatened assault, he voluntarily returns to meet his adversary, and renews the combat, it cannot be pretended he acts in defence of his own life against impending and inevitable destruction. He assumes, under such circumstances, a new character. He becomes a party voluntarily entering into an unlawful conflict, and is responsible for all the consequences following his new position. You are, however, the exclusive judges of the facts of this case, and if you are of the opinion that Hare was actually present and participated in the affray that led to the death of Rice, but are satisfied from the proof that a case of excusable self-defence has been made out within the principles of law, as expounded by the court, you ought to acquit him."

¹ 1 Hale, 486; Fost. 277.

² 1 Hale, 483; 4 Black. Com. 185.

Nor under the cover of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for, if A and B agree to fight a duel, and A give the first onset, and B retreat as far as he safely can, and then kill A, this is murder, because of the previous malice and concerted design.¹

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow; so in the case of excusable self-defence, it seems that the first assault in a *sudden affray all malice apart*, will make no difference, *if either party quit the combat and retreat before a mortal wound be given.*² According to this doctrine, if A, upon a sudden quarrel, assaults B first, and upon B's returning the assault, A really and *bonâ fide* flies, and being driven to the wall, turns again upon B and kills him, this will be *se defendendo*: but some writers have thought this opinion too favourable, inasmuch as the necessity to which A is at last reduced, originally arose from his own fault.³

If A challenges B to fight, and B declines the challenge, but lets A know that he will not be beaten, but will defend himself; and then B, going about his business and wearing his sword, is assaulted by A, and killed; this is murder in A. But if B had killed A upon that assault, it had been *se defendendo*, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not.⁴

(2.) *Repulsion of a felonious assault upon property.*

When an attempt is made to commit arson, or burglary, in the habitation, any part of the owner's family, or even a lodger, may lawfully kill the assailants, in order to prevent the mischief intended.⁵ "Here, likewise," says an eminent judge, "nature and social duty co-operate. A riotous and tumultuous body attempt to commit an arson on a church, or to maliciously burn and rob a bank; they may be resisted to the extreme extent required to repel them, and life itself may be taken, if the necessity of the defence demand it. In these cases the party killed is engaged in the commission of a crime of the highest grade, next to murder or treason, and he may be lawfully resisted even unto death."⁶

But a party so assailed, is not authorized to fire a pistol on every intrusion or invasion of his dwelling-house, which may be made forcibly at night; he ought, if he has a reasonable opportunity, to endeavour to remove the trespasser, without having recourse to the last extremity.⁷ M, who was indicted for murder, had made himself obnoxious to some boatmen, by giving information of certain smuggling transactions, in which some of them had been engaged; and they, in revenge, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police; the boatmen, however, as he was going away, called to him that they would come at night, and pull his house down: in the middle of the night a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention. M, under an apprehension, as he alleged, that his life and property were

¹ 1 Hale, 479; *People v. M'Leod*, 1 Hill, 377.

² *Fost.* 277.

³ 1 Hawk. P. C. c. 29, s. 17.

⁴ 1 Hale, 453.

⁵ *Fost.* 274.

⁶ *Com. v. Daley*, 4 Pa. L. J. 154.

⁷ *Oliver v. State*, 17 Ala. 587.

in danger, fired a pistol, by which one of the party was killed. Holroyd, J., "A civil trespass will not excuse the firing a pistol at a trespasser, in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass. So if a man with force invades and enters into the dwelling of another; but a man is not authorized to fire a pistol on every intrusion or invasion of his house: he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle: and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence: if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person, in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he was, perhaps, justified in firing as he did."¹

A man has a right to order another to leave his house, but has no right to put him out by force till gentle means fail; and if he attempt to use violence in the outset and is slain, it will not be murder in the slayer if there be no previous malice.²

And so on the other hand if A, in defence of his house, kills B, a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter;³ unless, indeed, there were danger of his life. But if B enter into the house, and A having first requested him to depart, gently lay his hand upon him to turn him out, and then B turn upon him and assault him, and A then kill him, it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession. And so it will be, if B enter upon A, and assault him first, though not intended to kill him, but only as a trespasser to gain the possession: for, in such case, if A thereupon kill B, it will only be *se defendendo*, and not manslaughter.⁴ And in such a case A, whether he be a householder or a lodger, being in his own house, need not fly as far as he can, as in other cases of *se defendendo*; for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight.⁵

When, however, there is a mere trespass against the property of another, the law does not admit the force of the provocation as suffi-

¹ Meade's case, 1 Lew. 184.

³ Oliver v. State, 17 Ala. 587.

² M'Coy v. State, 3 Eng. 451.

⁴ 1 Hale, 486.

⁵ 1 Hale, 485.

cient to warrant the owner in making use of any deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass. Should, on the other hand, the beating be with an instrument, or in a manner not likely to kill, it will only amount to manslaughter: and it is even lawful to exert such force against a trespasser, who comes without any colour, to take the goods of another, as is necessary to make him desist.¹

And indeed where in case of an attempt to defend a property not a dwelling house, no more force is asked than is necessary, and death ensues, the defendant should be acquitted. This will be abundantly considered hereafter, so far as concerns the attacks of mobs, no matter for what motive, on banks, churches, or other public buildings. And the same rule exists in reference to private buildings, though not used for dwelling purposes. Thus, on an indictment for manslaughter, where it appeared that a man and his servant had insisted upon placing corn in the prisoner's barn, which she refused to allow; they exerted force: a scuffle took place, in which the prisoner received a blow on the breast, whereupon she threw a stone at the deceased, the master, which killed him. Holroyd, J., said, "The case fails, as it appears the deceased received the blow in an attempt to invade the prisoner's barn, against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose; and she is not answerable for any unforeseen accident that may have happened in so doing."²

Even where the trespass is on a dwelling, only so much force as is reasonably necessary, can be used to turn out the trespasser. Upon an indictment for manslaughter, it appearing that the prisoner, upon returning home, found the deceased in his house, and desired him to withdraw, but he refused to go: upon this, words arose between them, and the prisoner becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused his death. Alderson, B., said, A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited, and gives another a kick, it is an unjustifiable act. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, is guilty of manslaughter.³

Where there is a statutory power given to exclude trespassers if necessary by use of fire arms, and a supposed trespasser is in this manner killed, there being no rashness or want of caution, the defendant will be acquitted. Thus, in a case already noticed, Sir William Hawksworth, being desirous to put an end to himself, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide by the statute *De malefactoribus in parcis*.⁴

Though a person who is set to watch a yard or garden by his master, is not justified in shooting any one who comes into it in the night,

¹ 1 Hale, 473, 486; 1 East, P. C. c. 5, s. 58, p. 289.

² Hinchcliff's case, 1 Lew. 168.

³ Wild's case, 2 Lew. 214.

⁴ 1 Hale, 40.

even if he sees him go into his master's hen-roost, and some dead fowls and a crow-bar be found near him; but if from his conduct he has fair ground to believe his own life in danger, he is justified in shooting him.¹

2d. *Execution of the laws.*

The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country, is an act of necessity, and where the law requires it.² But the act must be under the immediate precept of the law, or else it is not justifiable; and, therefore, wantonly to kill the greatest of malefactors, without specific warrant, would be murder.³

A subject of Great Britain, who, under direction from the local authorities of Canada, commits homicide in this state in time of peace, may be prosecuted in our courts as a murderer; even though his sovereign subsequently approve his conduct, by avowing the directions under which he did it as a lawful act of government.⁴

3d. *Killing of fugitives from arrest.*

A person indicted for a felony, and who will not suffer himself to be arrested by an officer, having a warrant for that purpose, may lawfully be killed by such officer, if he cannot otherwise be taken; though such person be innocent, and though in truth no felony have been committed.⁵ This however must be understood only of arrests by officers, and does not extend to arrests by private persons of their own authority.⁶

And as a general principle, where a party who is liable to arrest, endeavours peaceably to avoid it, he may not be killed; but whenever by his conduct he puts in jeopardy the life of any attempting to arrest him he may be killed, and the act will be excusable.⁷

As has already been laid down, and as will be seen more fully hereafter, peace officers and their assistants, endeavouring to disperse the mob, are justified, both at common law and by the riot act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed. And though it is always better that private individuals, under such an emergency, should array themselves under the known officers of the law, yet the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace.⁸

We have already seen that in civil cases, and also in the case of a breach of the peace, or any other misdemeanor, short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, it will be murder or manslaughter,

¹ *R. v. Scully*, 1 C. & P. 319; 1 East, P. C. c. 5, s. 44, p. 278.

² Fost. 267.

⁴ *The People v. M'Leod*, 1 Hill, 377.

⁶ 2 Hale, 84.

⁸ 1 Hawk. P. C. c. 28, s. 14.

³ 1 Hale, 501; 2 Hale, 411.

⁵ 1 Hawk. P. C. c. 28, s. 12.

⁷ *State v. Anderson*, 1 Hill, 327.

according to the peculiar circumstances by which such homicide may have been attended.' But if a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide.² Under the system of *hue and cry* as existing at common law in England, this duty to join in the recapture, is not confined to those who were present at the time of the commission of the felony so as to have ocular proof of the fact, or to those who first come to the knowledge of it: and though in our more thickly settled communities, it is expedient that a warrant should be taken out from a justice of the peace, yet where the population is sparse, and no justice can conveniently be found, there is no doubt that the neighbourhood may join in there pursuing and killing a felon. But it should be observed that if he surrender himself to his pursuers, it is murder if they then proceed to slay him, for it is their duty to hand him over for punishment to the officers of the law. And the same rule holds, if a felon, after an arrest, break away as he is carried to jail, and his pursuers cannot retake without killing him.³

Jailers and their officers are under the same special protection as other ministers of justice; and therefore, if in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the jailer, or his officer, or any person coming in aid of him will be justifiable homicide.⁴

The relations of officers of justice in this respect, have already been so fully considered, that it is not necessary now to do more than state in general that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable.⁵ A rule, remarks Sir W. Russell, founded in reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone; and a case in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being taken,⁶ seems to stand alone, and has been mentioned with disapprobation.⁷

4th. *Self-preservation in shipwreck.*

Upon the great authority of Lord Bacon it has been held that where upon two persons being shipwrecked, and getting on the same plank, one of them, finding it not able to save them both, thrust the other

¹ See ante, p. 48.

³ Post. 271; 4 Blac. Com. 179.

⁵ Hale, 494; 1 Hawk. P. C. c. 88, s. 17.

² 1 Hale, 489; Post. 271.

⁴ Post. 321; 1 Hale, 481.

⁶ 1 Russ. on Cr. 166.

⁷ Post. 276.

from it, whereby he was drowned, it is excusable homicide.¹ Lord Hale, however, doubts this, saying, that a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life, if he do not comply: so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.² To this Mr. East remarks, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion,³ there seems to be no reason why homicide may not also be mitigated upon the like consideration, of human infirmity; though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder.⁴

In this country, however, the subject has undergone the test of a judicial investigation in a court, and under circumstances peculiarly favourable to its careful consideration. In March, 1842, Alexander William Holmes was indicted, in the United States Circuit Court for the Eastern district of Pennsylvania, before Baldwin, J., for manslaughter. From the evidence it appeared that the ship *William Brown* left Liverpool on the 13th day of March, 1841, having on board sixty-five passengers and a crew composed of seventeen seamen, the whole number amounting to eighty-two, most of the passengers being Irish and Scotch emigrants. The voyage was very favourable until the evening of the 19th of April, at which time, while all were in their beds, except the watch, consisting of seven persons, among whom was Alexander William Holmes, the prisoner, a Swede by birth, the vessel struck an iceberg, and immediately commenced leaking. The sails were shortened, and resort was had to the pumps. Upon examination, it was found that the injury the vessel had received rendered her loss inevitable, and that the crew could only be saved, if saved at all, by taking refuge to the boats at once. The boats were immediately launched; in the long boat were crowded thirty-two passengers, besides a portion of the crew, in all forty-two persons; in the jolly boat were placed nine persons. The two boats pushed away from the ship, and the ropes by which they were attached to her were cut just before the ship went down. They remained together until the next morning, when they separated. During the first day the weather was moderate and the sea calm. From the moment the long boat reached the water it was necessary to bail; she was leaky, and the plug was insecure and insufficient for the purpose. She was so loaded that the gunwale was but a few inches from the water. Towards evening the sea became rough, and at times washed over the sides of the boat. On the second night, not much more than twenty-four hours after the abandonment of the ship, the sea becoming more and more tempestuous, and the danger of destruction imminent, the defendant, together with the remaining sailors, proceeded to throw overboard those passengers whose removal seemed necessary for the common safety. Relief shortly afterwards came, but great conflict of evi-

¹ 4 Blac. Com. 186; Ruth. Inst. c. 16, p. 187—190; Puffendorf's Law of Nature, 204; Herbert's Legal Maxims, 7.

² 1 Hale, c. 28, s. 26.

³ 1 East, P. C. c. 2, s. 15.

⁴ Ibid. c. 5, s. 61.

dence existed as to whether the boat could have held out in its original crowded state even during that short period. The question, therefore, whether, with no prospect of aid, acting under the circumstances which surrounded the defendant at the time the act was committed, such necessity existed as would justify the homicide, was one of great doubt. But a new principle was introduced into the case by the learned and able judge who presided. Holding that in such an emergency, there was no maritime skill required which would make the presence of a sailor of more value than that of a passenger, he maintained, with great power of argument, that in such case, it being the stipulated duty of the sailor to preserve the passenger's life at all hazards, if a necessity arose in which the life of one or the other must go, the life of the passenger must be preferred. If, on the other hand, the crew was necessary, in its full force, for the management of the vessel, the first reduction to be made ought to take place from the ranks of the passengers. But under any circumstances, it was held, the proper method of determining who was to be the first victim out of the particular class, was by ballot. The defendant, under the charge of the court, was convicted, but was sentenced to an imprisonment of comparatively light duration. "It is," said the learned judge, in the course of his charge, "not a case of necessity, if any other means of preservation remain; all must be exhausted; the peril must be imminent, present, and apparently avoidable only by the destruction of another, as in the ordinary cases of self-defence against lawless violence, designed to take away one's life, or to inflict a grievous injury to the person. On a kindred principle to self-defence, the law overlooks the taking of life under circumstances of imperious necessity—of a character similar to those which are now in evidence before you; as where two or more persons have, by an accident not attributable to either, and who owe no duty to the other which is not mutual, are by accident placed in a situation where all cannot survive; no one is bound to save the life of another by the sacrifice of his own, or commits a crime by saving his own in a struggle for the only means of safety. Of this description are the cases which have been put to you by the learned counsel in this cause, from writers of authority, upon the principles of national and municipal law, where each person is alike innocent of crime or fault, incurring the danger to the lives of all, and the sacrifice of one or more is necessary to save the remainder, cases which we rather leave to your imagination, than attempt to describe. Yet in such cases we must look not merely to the jeopardy in which the persons are placed; we must look to the relation in which they stood to each other; inquire whether the law has imposed any duty or obligation on one or more, from which the other was exempt; if in this respect, each and all stand in the same relative position, the law of self-preservation applies. And when this great and paramount law does apply, and the exemption it affords from punishment is not lost by its improper exercise on the devoted victim, the shedding the blood or taking the life of an innocent person, is divested of all immorality by reason of the overpowering necessity under which it was committed. It is a common saying, that necessity has no law; it is also a maxim of jurisprudence, for laws are made to meet the ordinary occurrences of life, where man is a free agent, with

a volition to do and act as he chooses; but the law makes no provision for cases where man acts from an impulse which he can neither resist nor suppress by the exercise of his reasoning faculties; he then becomes his own legislator, and may surrender his own life, or save it as he can, when no law or duty imposes on him the obligation to devote himself to destruction to save another. But before the protection of the law of necessity can be invoked, a case of necessity must exist; the slayer must be faultless; he must owe no duty to the victim; be under no obligation of law to make his own safety a secondary object; and if, in any of these particulars, his case is defective, he is answerable to the law of the land, without any immunity under the shield of necessity. It cannot be a passenger's duty to take on himself the protection of a sailor, when he has the right to call on the sailor for protection; the former need not take, and the latter cannot throw off the dread responsibility; there must indeed be a sufficient number of seamen to navigate and preserve the boat; but if there are more than sufficient for these purposes, the residue have no right to call for the sacrifice of a passenger for their protection. There can be no contribution in such a case; the sailor and the passengers are not in an equal position; in the language of the writer, quoted by the defendant's counsel, the sailor 'owes more benevolence towards another than to himself; is bound to set a greater value on their life than his own; and the law makes it his duty to say, in the words cited by Lord Bacon, it is necessary that I should go, not that I should live.' This may be deemed a harsh rule, partaking of cruelty to the sailor, who has thus far done his duty; but when no hope remains save the dreadful alternative of sacrificing a sailor or a passenger, it would be still more harsh and cruel to make the passenger the victim, to save the sailor who was not wanted for the preservation of the boat. If its safety requires the services of all the sailors, and some of the passengers must go, they stand on an equal footing towards each other; so if there are no passengers, and some of the sailors must go; in either case they may contend with each other for their own preservation. Two sailors may struggle with each other for the plank which can sustain but one, but if the passenger is on it, even the law of necessity justifies not the sailor who takes it from him. The emergency which creates the necessity for one or more victims, gives no authority to any one to make a selection among these, between whom and himself there are equal and mutual relations. Some mode should be adopted which exposes all to an equal peril, and gives each an equal chance of life. What that mode is or ought to be, is neither defined by writers on the law of nature, by statute, or settled rules of the common law, for obvious reasons arising from cases of necessity which can neither be foreseen nor provided for. There is, however, one case on which all writers agree, and one rule which seems to meet with universal consent, when the ship or boat is in no danger of sinking, and all sustenance is exhausted, whereby it becomes necessary to make one a sacrifice to appease hunger; the selection is by lot, that being resorted to as the fairest mode, and deemed to be in some measure an appeal to Providence to choose the victim. We have neither heard, read, nor known any other mode, and can conceive none so consonant to justice and humanity. A sudden, unforeseen peril, may

preclude any deliberation or consultation, when destruction may follow upon all while casting lots, or the darkness of the night prevent it. But when the source of the danger has been seen, and no new cause has arisen, so that there was time to consult, to cast lots, or select the victim, it is a duty to do it, in order to guard against partiality, oppression, violence, or contention, and thereby put the weak and the strong on the same footing. Imagination cannot conceive a scene more horrible than a struggle between sailor and sailor, passenger and passenger, or in a mixed affray, in which each endeavoured to destroy the other, under circumstances which most loudly call for some fair and just means of deciding whose life must be given up for the common safety. When it is done by lots, the victim submits to his fate; if attempted by force, their common destruction might be inevitable, in the struggle which each would make to preserve himself, and has a right to make, when the law of necessity is enforced contrary to those rules by which alone it can be justified. If the lot is cast, the person on whom it falls must submit; if he resists, force may be employed to put him over, or if the necessity of a sacrifice arises from famine, the allotted victim may be seized and slain. When thus administered, the law of necessity supersedes all other laws. It operates as a dispensation from punishment, with all the lasting effects of a pardon for the act. When the survivors can make out such a case, they need not fear human laws, which do not doom them to death, to prison, or fines for taking the victim's life, or that innocent blood will be laid to their souls hereafter; but a fearful peril awaits those who take on themselves the destruction of life, by assuming that it is necessary when no necessity exists, or its rules are not observed. In this respect those who execute the laws of necessity by the infliction of death, stand in the same position of responsibility to the penal laws of the country as the public officer who executes a death warrant on a convicted criminal; he stands justified in both cases, when he acts pursuant to the warrant of the law, but without justification when he disobeys or departs from its requirements, in any particular whereon his authority depends. The captain and such of the seamen as are necessary to the preservation of the ship or boat, are not bound to draw lots, for unless these abide in the ship, all will perish. This is the sailor's privilege, his high prerogative, conferred on him for the common safety, clothed with which he is exempted from other risk of life than what attends the seaman after the immolation of those who have been doomed to death for the sake of others. But this privilege or exemption is founded upon reasons which must not be disregarded. The law does not favour him merely because he is a sailor, it is as the instrument of common preservation—not to prefer his life to others, or absolve him from any duty incumbent on him in virtue of his occupation, or relieve him from any of its incidental perils. Where the reason of the exemption ceases, the supernumerary or the useless sailor stands without any privilege, the common safety not requiring it. He must submit his fate to the casting of lots, and if it fall on him, the law does not justify him in resisting, or putting another in his place. Nor is the seaman less an offender against the law if the ship or boat is in a situation where there can be a consultation as to the degree of danger, and the necessity of drawing lots;

if the exigency has not happened, though probable or certain at some future time, and neither takes place to justify or excuse the omission of either consultation or lot, there must be a case of necessity made out, strong, clear and decisive, on the minds of those whose duty it is to closely scrutinize on his trial the conduct of the man who takes the life of his fellow man. Without consultation, who is to decide who shall the victim be, and how many? Who that looks to the consequences here or hereafter, will not shudder at such an appalling responsibility? Where is his warrant for being the judge, and making his mere opinion fatal to the devoted objects of his assumed powers? Holy writ tells us what was done on an occasion where there was a sacrifice of one man made for many, and points to the compass by which mariners must steer when their voyage is beset with peril to the lives of all.¹

IV. DEATH PRODUCED BY OTHER CAUSES.

If death,² says Mr. Greenleaf, ensues from a wound given in malice, but not in its nature mortal; but which being neglected or mismanaged, the party died; this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear, that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died.³ So, if the deceased were ill of a disease apparently mortal, and his death were hastened by injuries maliciously inflicted by the prisoner; this proof will support an indictment against him for murder; for an offender shall not apportion his own wrong.⁴

When it appeared that the death was caused by a blow on the back of the neck, and that the deceased was not at the time in a good state of health, and that she was desired to remain in a hospital, where she could best be attended to, but would not, Parke, B., said, "It is said, that the deceased was in a bad state of health, but that this is perfectly immaterial; as if the prisoner was so unfortunate as to accelerate her death, he must answer for it."⁵

The deceased had been waylaid and assaulted by the prisoner, and that amongst other wounds, he was severely cut across one of his fingers by an iron instrument. The surgeon urged him to submit to amputation of the finger, telling him that unless it were amputated, he considered that his life would be in great hazard. The deceased refused to have the finger amputated. The surgeon dressed it, and the deceased attended from day to day to have the wound dressed; at the end of a fortnight, however, lock-jaw came on, induced by the wound on the finger; the finger was then amputated, but too late,

¹ U. S. v. Holmes, pamph. 1848, S. C., 1 Wall, Jun.

² 3 Green. on Ev. s. 139.

³ R. v. Raw, J. Kely. 26; 1 Hale, P. C. 428; Russ. on Cr. 505; R. v. Holland, 2 M. & Rob. 351; Alison's Crim. Law of Scotland, 147; Parson v. State, 21 Ala. 300; M'Allister v. State, 17 Ala. 587.

⁴ 1 Hale, P. C. 428; 1 Russ. on Cr. 505, 506, and notes by Greaves; R. v. Martin, 5 C. & P. 128; R. v. Webb, 1 M. & R. 405.

⁵ R. v. Martin, 5 C. & P. 128.

and the lock-jaw ultimately caused death. The surgeon deposed, that if the finger had been amputated at first, he thought it most probable that the life of the deceased would have been preserved. It was contended for the prisoner, that the cause of the death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment. Maule, J., however, was clearly of opinion that this was no defence, and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was, whether in the end the wound inflicted by the prisoner was the cause of the death.¹

In a late case in the Supreme Court of Alabama, Goldthwaite, J., said, "The prisoner was indicted for the murder of one Mayo. On the trial of the case below, the evidence was conflicting as to whether the deceased came to his death from a wound inflicted by the defendant, or from the improper treatment which was resorted to by the attending physician, the wound not being considered a mortal one. It was what is termed a 'punctured wound,' and the improper treatment which was relied on, was the bringing of its edges together, and sewing it with stitches. The court, upon this evidence, was requested to charge, 'that if the wound was not mortal, but by ill treatment or unwholesome applications, the said Mayo died, if it clearly appears that this treatment, and not the wound, was the cause of his death, the defendant should be acquitted.' This charge the court gave, but with the addition, 'that if the ill treatment relied upon was the sewing up of the wound with stitches or other compresses, that the defendant would not be excused if otherwise guilty,' and this addition or qualification of the charge is relied upon as the ground of reversal. We all agree that, ordinarily, if a wound is inflicted not dangerous in itself, and death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable.² And we agree, also, that if the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment."³

On a trial for manslaughter through the administration of Morrison's pills, it appeared that at the time of the administration the deceased was ill of the small pox. Medical witnesses all gave it as their opinion that the exhibition of the pills in such doses must have aggravated the disease under which the deceased laboured, and have accelerated his death; and one of them said, that the deceased died of small-pox heightened by the treatment he had received. It was objected, that the indictment was not supported by the evidence, which only proved that the deceased died of a natural disorder, accelerated by improper treatment. It might be conceded, for the sake of argument, that if the indictment had so stated the case, it might have been sufficient; but the indictment made quite a different charge, viz., that

¹ *R. v. Holland*, 2 M. & R. 351.

² 1 Hale, P. C. 428; 1 East, C. L. 344, s. 113.

³ *Parson v. State*, 21 Ala. 301.

the party died wholly and solely of a mortal sickness caused by the medicine and improper treatment. Lord Lyndhurst, C. B., said: "It is true the witnesses do not say whether the deceased would, in their opinion, have died of the small-pox if the pills had not been administered; but they all agree in this, that his death was accelerated by the pills. Now, their evidence being translated, comes to this, that the party died on the day when he did die, viz., on the 27th of June, by reason of taking the pills. At present, therefore, it appears to me that the indictment was good." And in summing up, the very learned chief baron adhered to the opinion he had already expressed on the argument, and left it to the jury to say, "whether the death of the deceased had been occasioned or accelerated by the medicines administered by the prisoner."¹

If a man, to adopt Lord Hale's statement, be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to circumstances in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong.²

And so where a surgical operation is performed in a proper manner, and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound, will nevertheless be responsible for the consequences.³

If it appear that the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might and probably would have been the result of the disease with which the deceased was afflicted at the time of the violence.⁴

Where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances; Coleridge, J., told the jury that if a person inflicted an injury upon a person labouring under a mortal disease, which caused that person to die sooner than he otherwise would have done, he was liable to be found guilty of manslaughter, and the question for them was, whether the death of the wife was caused by the disease under which she was labouring, or whether it was hastened by the ill usage of the prisoner.⁵

¹ R. v. Webb, 1 M. & Rob. 405.

² 1 Hale, 428.

³ Com. v. M'Pike, 3 Cush. 181.

⁴ State v. Morea, 2 Ala. 275.

⁵ R. v. Fletcher, 1 Russ. on Cr. 507. Mr. Greaves states that the jury acquitted; the evidence of the surgeon leaving it doubtful whether the death did not arise purely from natural causes. The first and second counts of this indictment were in the ordinary form where the death has been caused by blows; the third alleged that S. F. was ill of a certain mortal disease, whereof, according to the course of nature, she, after a long space of time, (to wit,) after the space of four months, would have died; that the prisoner assaulted and beat, &c. (in the usual form,) S. F. so being sick and ill as aforesaid, giving her divers mortal strokes and bruises, and which said mortal strokes and

When an indictment charging the death to have been occasioned by two co-operating causes, and the evidence failing to support one of the causes, is sufficient. A count stated the death to have been caused by omitting to give the deceased proper food, and also by beating; it was held that the prisoner, being a married woman, was not legally responsible for omitting to provide food, and consequently that this count, which charged the death jointly by starving and beating, was not supported.¹

If the indictment charge the death to have arisen from one cause, and it appears that the death was accelerated by that cause, but really arose from another, not being a natural cause, the evidence does not support the count. A count charged the death of a child to have been occasioned by exposure to cold; the evidence was, that the child was found in a field, alive, with a contusion on the head, and that it died a few hours afterwards: the medical men stated that the contusion was in itself sufficient to occasion death, and that the exposure might have accelerated it: it was submitted on behalf of the prisoner, that supposing the death to have been accelerated only by the exposure, the count which charged it as the cause could not be supported, and of this opinion was the judge, who tried the case.²

It is not necessary that the homicide should have been the effect of the direct violence of the defendant. If a person being attacked, should, from an apprehension of immediate violence, an apprehension which must be well grounded and justified by the circumstances, throw himself for escape into the river, and be drowned, the person attacking him is guilty of murder.³

V. CHARACTER OF THE DEFENDANT.

The defendant's character can only be drawn into issue by himself,⁴ and he is restricted in so doing to the particular trait or quality involved in the prosecution.⁵ Peaceableness or regularity of conduct, and good feeling to the deceased, would therefore be the proper points of defence in a trial for homicide; and it would be absurd to divert the issue to other qualities, the bona fide possession of which would be perfectly reconcilable with guilt.⁶ It was for some time considered doubtful, whether the introduction of evidence of good character was a right, appertaining in every case to a defendant on a

bruises did then and there greatly hasten and accelerate the death of S. F., of the same disease whereof she was then and there sick and ill as aforesaid, by then and there irritating, causing, and provoking the said disease to operate more violently and speedily than the same would otherwise have done; of which said mortal disease, so irritated and provoked as aforesaid, S. F. did languish, &c., (in the usual form,) on which said day S. F., of the said mortal disease, so irritated and provoked as aforesaid, did die, &c. No objection was made to this count, which was framed on 1 Hale, 428.

¹ *R. v. Sanders*, 7 C. & P. 277.

² *Stockdale's case*, 2 Lew. 220.

³ *R. v. Pitts*, 1 Car. & Mars. 284.

⁴ *Fannin v. State*, 14 Miss. 386; *Ball. N. P.* 296; *Com. v. Webster*, 5 Cushing, 325; *People v. White*, 14 Wend. 111; *Carter v. Com.* 2 Virg. Cases; *State v. Merrill*, 2 Dev. 269; *State v. O'Neil*, 7 Ired. 251; *Com. v. Hopkins*, 2 Dana, 418.

⁵ 1 Greenleaf on Ev. s. 55; 3 *Ibid.* 25; 1 *Phil. Ev.* 469, 9th ed.; 2 *Russ. on Cr.* 784; *Best on Presump.* s. 153.

⁶ *Ibid.*; *R. v. Clarke*, 2 Stark. 241; *R. v. Hodgson*, R. & R. 211; *Douglass v. Towsey*, 2 Wend. 315; *Carroll v. State*, 3 *Humph.* 315.

criminal trial, or was an accident to be regulated by the discretion of the judge as the evidence might appear to him to be relevant or not. It is not intended here to consider the class of cases in which it was supposed to be inadmissible, e. g. cases of clear guilt, because in capital cases, which this treatise principally concerns, it was always held admissible in *favorem vitæ*, and because even in cases of misdemeanors the distinction is now entirely abandoned, so far as this country is concerned.' It may now indeed be considered as settled that the defendant is entitled, in all cases whatever, to introduce evidence of his good character, so far as relates to the subject matter of the prosecution.

The defendant, however, is restricted to general evidence,² it being reserved to the prosecution to put in evidence particular acts, should the defendant open the way by putting general character in issue.³

¹ *R. v. Stannard*, 7 C. & P. 673; *Com. v. Hardy*, 2 Mass. 317; *State v. Wells*, Coxe's R. 424; *Wills on Cr. Ev.* 131; *Com. v. Webster*, 5 Cush. 324, 325; *U. S. v. Roudenbush*, 1 Baldw. 514; *State v. M'Daniel*, 8 Sm. & M. 401; *Davis v. State*, 10 Ga. 101.

² *Archbold*, C. P. 104; 2 Russ. on Cr. 784.

³ *Ibid.*; *Com. v. Robinson*, Thach. Cr. Cases, 230.

The remarks of Sir William Russell as to the weight to be attached to this species of testimony are worthy of grave consideration: "It has been usual to treat the good character of the party accused, as evidence to be taken into consideration only in doubtful cases. Juries have generally been told, that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion upon the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer." 2 Russ. on Cr. 785.

"To these remarks," says Mr. Sergeant Talfourd, "we may be permitted to add, that, according to the language frequently adopted by judges in their charges, it may be proved that character is in no case of any value. They say that, in a clear case, character has no weight; but if the case be doubtful—if the scale hangs even—then the jury ought to throw the weight of character into the scale, and allow it to turn the balance in the prisoner's favour; but the same judges will tell juries, 'that in every doubtful case they ought to acquit,' stopping far short of the even balance, and that the prisoner 'is entitled to the benefit of every reasonable doubt.' In clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted: it is never to be considered by the jury but when the jury would acquit without it. The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear. There may certainly be cases so made out, that no character can make them doubtful; but there may be others in which evidence given against a person without character, would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive. It is, in truth, a fact varying greatly in its own intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed, but always a fact, fit, like all other facts proved in the cause, to be weighed and estimated by the jury." Dickens. 20, s. 563.

"There are cases of circumstantial evidence," says Chief Justice Shaw, "where the testimony adduced for and against a prisoner is nearly balanced, in which a good character would be very important to a man's defence. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crime. He may show, that notwithstanding these suspicious circumstances, he is es-

While, however, the general rule is universally acquiesced in, that it is incompetent for the prosecution to put in issue the defendant's character *qua* character, there have been not a few cases in which this result has been approximated under cover of proof of the *quo*

teemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty would satisfy a jury that he would not be likely to yield to such a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character." *Com. v. Webster*, 5 Cush. 535; *Bemis' Webster case*, 495, 496.

Mittermaier (*Deutscher Straf.* p. 131,) says, "Throughout the middle ages, the German as well as the Latin codes made ill repute a cause of inquest, and attached to it certain consequences adverse to the defendant in the original and mesne process, on a substantive trial. Similar expressions occur in the modern codes, and in the proceedings preparatory to the trial by jury, it is an important point of the defence to establish the good character of the accused by witnesses. In the German practice, the inquiry into reputation has grown into a principal portion of the inquest, in the shape of a statement on the record, of the walk and conduct of the accused, and his moral character. The influence of the character of the accused upon the weight to be ascribed to the suspicion, and the requisition of the modern codes that he be put face to face with the judge, make this inquiry particularly valuable."

"The better course, is to examine witnesses in regard to the character of the accused; the result, however, will depend upon the selection as witnesses, of those who are best able to speak from personal experience of the facts necessary to be known, for the purpose for which the inquiry is conducted. This inquiry is general, when its purpose is merely to learn the walk and the personal character of the accused. This will be attained by the general questions put to the accused; the inquiries made of the municipal authorities under whose jurisdiction he lived, and the trial of the persons who had an opportunity of becoming acquainted with him. But it is also special, for the purpose of obtaining cognizance of particular circumstances of his life, (e. g. a disposition to commit certain offences,) or peculiarities of his moral nature, (e. g. in questions of self-defence, a peaceable disposition,) the knowledge of which is necessary to a proper appreciation of certain points which exert an influence on the decision whether the facts referred to are incriminatory or exculpatory. Where the evidence is involved and circumstantial, or where a partial confession has been obtained, this investigation must not be omitted. Its importance in particular cases will vary as the circumstances evolved at the primary examination, which demand further remark, are more or less weighty, or as the trial takes a turn which makes the discovery of the moral peculiarities of the accused more or less desirable. Its direction will be determined by the nature of the crime, (as for instance, in infanticide,) which is in question, and in one and the same species of crime by the particular turn and course of the proceedings. The judge must bear in mind that impertinent matters, the investigation of which would swell the costs and cause delay, must not, perhaps to gratify an idle curiosity, be made the subject of an inquiry into character; but a declaration of opinion of the witness on the character of the accused will never suffice, and the witness must state the arguments and facts upon which he founds his opinion, and the necessary proofs thereof, so that the inquiry may, if necessary, be extended to the application of the proofs thus adduced." See *Wh. C. L.* (2d ed.) 237.

animo. Thus, in Connecticut it has been held that on the trial of a man charged with the murder of his wife, the state could show, for the purpose, it was said, of rebutting the presumption of innocence arising from the marital relations between the defendant and the deceased, that he had lived in adultery with another woman.¹

And in Alabama, on a trial for a similar offence, proof that the prisoner during the year preceding the homicide, applied to the mother of a single woman for permission to visit her daughter, and was denied it because he was a married man, is admissible to show a motive for the commission of the crime.²

And obnoxious as such evidence is in one respect to the great common law principle which secures the inviolability of character until the attack is invited, the exception has been too long recognised to be now excluded.

Thus, on an indictment for murder, former attempts of the defendant to assassinate the deceased are admissible in evidence; so are former menaces of the defendant, or expressions of vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question.³ On the trial of an indictment for assault and battery, in order to show some motive of resentment on the part of the defendant, it was held competent for the state to prove that the prosecutor had said, in the defendant's hearing, a short time before, "that no honest man would avail himself of the bankrupt law," and that to prove further, that the defendant's father had previously been talking about taking the benefit of that act.⁴

So, on an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that at some other time the prisoner intentionally shot at the same person.⁵ Evidence of a single instance of unlawful gaming, may go to the jury, upon the trial of one indicted as a common gambler, and, with other circumstances, e. g., that he displayed gaming implements, &c., might warrant a conviction; while proof of many instances of playing, accompanied with evidence that the accused pursued a lawful calling and only played for pastime, might not.⁶ Upon a trial of an indictment for passing counterfeit bank notes, proof that prisoner had, about the same time, passed another note of the same kind which was thought to be a counterfeit, and which he took back, though this note is not produced on trial, is admissible evidence to prove the scienter.⁷ It may also be proved by the fact of similar forged orders being found in the possession of the defendant, or of an accomplice in passing them.⁸ And so, too, evidence of prior indecent assaults upon the prosecutrix is admissible in a prosecution for rape.⁹

¹ *State v. Watkins*, 9 Conn. 47.

² *Johnson v. State*, 17 Ala. 618; see, also, *Stone v. State*, 4 Humph. 27.

³ See *Arch. C. P.* 73; *State v. Wisdom*, 8 Porter, 511; *Cole v. Com.* 5 Grat. 696.

⁴ *State v. Griffiths*, 3 Ired. 504.

⁵ *R. v. Voke*, R. & R. 531.

⁶ *Com. v. Hopkins*, 2 Dana, 419.

⁷ *Martin v. Com.* 11 Leigh, 745; *Spencer v. Com.* 11 Leigh, 751; *Hendrick v. Com.* 5 Leigh, 708; *U. S. v. Craig*, 4 Wash. C. C. R. 729; *State v. Antonio*, 2 Tr. Car. R. 776; *U. S. v. Doeble*, 1 Baldwin, 519.

⁸ *Com. v. Percival*, Thacher's C. C. 293; *State v. Turtly*, 2 Hawks, 248; *U. S. v. Harman*, 1 Baldwin, 292.

⁹ *Williams v. State*, 8 Humph. 585.

It should be observed, however, that while evidence of distinct acts of crime is admissible when tending to show special malice to an individual, or the *scienter*, they cannot be received to prove a tendency to commit the particular class of crimes of which the defendant is accused, and a *fortiori*, as general evidence of such a tendency inadmissible. Thus, in England, it has been held, that on the trial of a person charged with an unnatural crime, it was not evidence to prove that the defendant had admitted that he had a tendency to such practices;¹ and so on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits in punishing other slaves is not admissible for the prosecution.² It is at this point, indeed, that the common and the civil law diverge. In the first, the issue is, whether the defendant was guilty of the particular offence, and he advances to meet this issue with a presumption of general good character, which nothing but his own election can defeat. No matter what independent crimes he may have been guilty of, or what infamy he may have incurred, unless he invite the investigation himself, neither crime nor infamy can be advanced against him. But under the civil law, the issue is not whether the accused committed the particular offence, but whether his general guilt is such as to make his removal from society a general benefit. To this inquiry, the particular accusation is used merely as an avenue. Thus, by the common law, as has just been seen, the court will check any attempt whatever, to show that the defendant's character and antecedents, were such as to exhibit a tendency to the particular crime charged; while on these points, by the civil law, the public prosecutor is encouraged to collect as great a mass of details as possible, and to spread it before the court at the outset. Of this distinction, a curious illustration is found in a case which has excited both popular and physiological speculation in Germany.³ A young woman, in the streets of Leipsic, one night was assaulted by a man in a cloak, who darting from behind a dark corner, struck into her arm, above the elbow, the blade of a small lancet, and having inflicted a slight wound, retreated. He was arrested, and in this country would have been tried for an assault and battery, unless he provoked a widening of the issue. But it had been rumoured about a short time previously, that a very remarkable species of monomaniacs had lately made their appearance in Leipsic, called *Mädchenschneiders*, who were influenced by an uncontrollable propensity to plunge, skin-deep, into the arms of any young maidens whom they could meet, a small lancet. This was brought into the issue; and three questions were presented for investigation, on which a vast amount of physiological refinement, forensic skill, and judicial exposition were spent: 1st. Did such a propensity exist; 2d. Had it been generally executed; and 3d. Was the defendant's moral tone and past history, such as to make it probable that it would exert over him a control inconsistent with the convenience and the comities of society? These points, after protracted investigations, were determined against him, and he was convicted and sentenced accordingly.

¹ 1 Phillips on Ev. 499; 1 Russ. on Cr. 700.

² Dowling v. State, 5 S. & M. 664; see, also, State v. Kenton, 15 New Hamp. 169.

³ See Annales der Deutscher, und Ausländischer, Criminal-Rechts-Pflege, von Dr. J. C. Hitzig.

A precise counterpart to this, so far as the principle is concerned, occurs in the trial, in London, in 1789, of a man named Williams, who was possessed with a passion the same as that which beset the "Mädchen Schneider." When he was at last arrested, he was met with a series of indictments which charged him with assaulting, in the year 1789, a variety of spinsters;" it being averred by way of description, in each case, that he did "cut, tear and deface her silk gown," and "did cut, strike and wound her." His manner of inflicting the wound was the same as that described in the text; but so artful and cautious were his movements that it was not until the public were enlisted in unferreting him by permanent advertisements, that he was at last detected. On the first trial he escaped on account of misdescription in the details; but he was remanded to wait his trial for the common assault, upon a number of which he was severally convicted. The narrow issue and brief evidence each case presented, forms a vivid contrast to the elaborate and metaphysical investigation of the civil law. The prosecutrix was called, proved the assault, was followed by medical evidence of the wound, and such testimony as belonged to the *res gestæ*, and then in the second and subsequent trials, the chairman said to the jury, "you will endeavour, if possible, to forget every thing that passed even yesterday, and to treat this as a new offence; and to treat the prisoner, in your judgment upon him, as if you had never heard of him, but that he was now brought before you, charged with an assault, *proved only by one witness*, but with certain corroborating circumstances." On the first trial, Buller, J., who never forgot the great guarantees of the common law, was equally emphatic. "You will totally lay aside every thing you may have heard before you came into this court, and consider the case coolly and dispassionately *on the evidence given*."²

It is not a conclusion of law that an omission to produce evidence of *good* character, affords the presumption of *bad*.³

VI. CHARACTER OF THE DECEASED.

It has already been briefly considered how far the character of the deceased, for peace and order, may be drawn into question, when the defence taken is that the defendant, from all the circumstances in the case, of which the deceased's character was one, had reason to be in fear of his life. As was there shown, there have been cases in which courts have been obliged to allow great evidence to be introduced, and it is easy to imagine cases in the future in which it would be impossible to exclude it.⁴ But as a general principle, the rule continues unbroken, that evidence that the deceased was riotous, quarrelsome, and savage, is inadmissible, even though such knowledge be brought home to the defendant himself.⁵ Any other rule would allow a private citizen to take upon himself the province of government in the punishment of crime.

¹ See Lawyer's Mag., London, 1792, vol. ii. p. 351.

² Ibid. vol. i. p. 422.

³ People v. Bodine, 1 Denio, 281; State v. O'Neil, 7 Iredell, 251.

⁴ See ante, 216, 217; Queensbury, v. State, 3 Stew. & Porter, 315; State v. Tackett, 1 Hawks, 210; Oliver v. State, 17 Ala. 587; Wright v. State, 9 Yerg. 342; Com. v. Seibert, ante.

⁵ State v. Field, 14 Maine, 248; State v. Tilley, 3 Ired. 424; Com. v. York, 9 Met. 110; State v. Hawley, 4 Harring. 562.

CHAPTER X.

INDICTMENT, PLEAS, AND VERDICT.

THE main points in the chapter will be considered as follows:—

- I. Name.
- II. Addition.
- III. Time and place.
- IV. "Force and arms."
- V. "Moved and seduced by the instigation of the devil."
- VI. "In and upon one E. F."
- VII. "In the peace of God and of the said state, then and there being."
- VIII. "Feloniously, wilfully, and of his malice aforethought, did make an assault."
- IX. "With a certain knife" (means of death.)
- X. "Of the value of, &c."
- XI. "Which he the said A. B. in his right hand then and there had and held."
- XII. "Him, the said E. F., in and upon the left breast of him the said E. F."
- XIII. "Then and there feloniously, wilfully, and of his malice aforethought."
- XIV. "Did strike and thrust, giving to the said E. F. then and there with the knife aforesaid."
- XV. "In and upon the said left side of the breast of him the said E. F."
- XVI. "One mortal wound of the breadth of three inches, and of the depth of one inch."
- XVII. "Of which said mortal wound the said E. F. from, &c., to, &c., at, &c., did languish, and languishingly did live."
- XVIII. "Of which said, &c., at, &c., of the wound aforesaid, died."
- XIX. "And so the jurors aforesaid, &c., do say, that the said A. B., him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder."
- XX. "Contrary to the form," &c.
- XXI. Distinctive feature of manslaughter.
- XXII. Pleas.
- XXIII. Verdict.

I. *Name.*

The Christian and surname of the defendant, if known, should be stated with correctness; except in an indictment against the inhabitants of a county or parish, who may be so described without naming

any of them.¹ But if the name of a prisoner is unknown, and he refuses to disclose it, an indictment may be sustained against him as “a person whose name is to the jurors unknown, but who is personally brought before the said jurors by —, the keeper of the prison of —.”² A man cannot be indicted with an *alias dictus* of the Christian name, as “*John*, otherwise *Robert*,” though to an alias of the surname there is no objection;³ surnames being originally acquired by assumption.⁴ An indictment was quashed *before* plea, because an addition was placed, not after the first name, but after the *alias dictus*;⁵ but this defect is cured by plea.⁶ The cases tend to show that if a defendant has more than one Christian name given him in baptism, as John Thomas, they are considered in law as forming one Christian name, and must be set out correctly in their order;⁷ though in New York it is declared that a middle name is surplusage, and its omission to be disregarded.⁸ The proper name of a bastard is that he has gained by reputation, and not his mother’s name, unless so gained.⁹

(*Place of residence of defendant.*) With respect to residence, it is a good addition of this kind to name the party *late* of a township named;¹⁰ in which respect this addition differs from that of the *estate, degree, or mystery*; and it is said, that if the defendant be named commoner in A., late of B., it is sufficient.¹¹ As will be seen in the forms hereafter given, the residence in most of the states is held to be satisfied by the allegation “late of the county aforesaid,” or “late of — county.”¹² In England greater exactness is required; and where in an indictment for an assault, the defendant was described as late of A. in the county of B., without stating that A. was a parish, it was holden bad; although the offence was laid to have been committed at the *parish aforesaid*; for some certain venue must appear on the face of the record, and here the offence is laid *at the parish aforesaid*, and no parish is mentioned.¹³ In the city of New York the practice is to charge “late of — ward in the city of New York.”

With respect to addition of place, the best and most convenient course is to state that in which the prisoner committed the offence; for he is considered as conversant of that place, and by this means the confusion of stating two places in the indictment is void.¹⁴

II. Addition.

(*Proper addition of the accused party.*) The statute 1 Hen. V. c. 5, enacts, that in all indictments on which process of outlawry lies, additions shall be made to the *defendants’* names, of their estates or

¹ 2 Hawk. c. 25, s. 68; Archbold’s C. P. 25; Wh. C. P. 5.

² R. v. —, R. & R. 489.

³ 1 Ld. Raym. 560.

⁴ See cases collected, 5 M. & W. 447; see, also, per Lord Stowell, *Wakefield v. Wakefield*, 1 Hagg. Cons. R. 400; *Barlow v. Bateman*, 3 P. Wms. 54.

⁵ R. v. Semple, 1 Leach, 420.

⁶ R. v. Hannam, ib. n.; see Cro. Jac. 482, 610.

⁷ *Com. v. Perkins*, 1 Pick. 388; *Jones v. Macquillon*, 5 T. R. 195; 3 East, 111; *Willes*, 554; *Evans v. King*, *Pouget v. Tomkins*, 1 Phill. R. 499; *Stanhope v. Baldwin*, 1 Addams’ R. 93; see 1 M. & Gr. 783, n.

⁸ *Roosevelt v. Gardiner*, 2 Cow. 463.

⁹ R. v. Clark, R. & R. 358.

¹⁰ See *Dickinson’s Q. S.* 203; R. v. Yandell, 4 T. R. 521.

¹¹ *Cortizos v. Munoz*, Stra. 924.

¹² See Wh. C. P. 7.

¹³ R. v. Mathews, 2 Leach, 664; 5 T. R. 162.

¹⁴ 2 Hawk. c. 27, s. 125, 126.

degree, or mystery, and of the towns or hamlets, or places, and the counties of which they were or are conversant. This statute has been either recognised as in force in those states where the question has been brought up independent of local legislation, or has been substantially re-enacted.¹

In England, if an accused have several titles, he must be described by the most honourable; and if he have none by birth, office, creation, or reputation, and is described by any such, or if a *gentlewoman* be named merely *spinster*, or a *yeoman* is named *gentleman*, the indictment will be defective.² But a trader may be sued either by his degree or rank in society, independent of his trade, or by the name of his vocation.³ A misdescription, however, calculated to throw contempt on the defendant is bad, and on this ground an indictment was held vicious in abatement, which described the defendant as a lottery vender, when he was in fact a lottery broker.⁴

By stat. 8 Hen. VI. c. 10, s. 1, 2, the indictment ought to contain the addition of the *place and county* where the party indicted is "conversant and dwelling." The county in the margin refers to the place where the offence was committed, and not to the habitation of the party. Accordingly an outlawry for perjury was reversed on *error*, for the party was indicted by the name "N. L., late of the *parish* of A.," without showing in what county A. is, though "Middlesex" was in the margin.⁵

Neither yeoman nor labourer is a good addition for that of a woman; and widow, single woman, wife of A. B. and spinster, are good additions of the estate and degree of a woman; but burgess and citizen, and servant, are all of them too general, and therefore not good additions of the estate or degree either of a man or woman.⁶ Thus, in an indictment for assault, the addition was stated as gentleman. The plea that he was an esquire and no gentleman, was overruled, and Fortescue, J., said, "This is in addition only, not in the name, and they are the same, and every esquire is a gentleman, and gentlemen are called esquires."⁷ The prisoners were jointly indicted for stealing clothes, M. W. being described in indictment as "Margaret Woodward, *single woman*," and she pleaded to that indictment. The only evidence was that the prisoners addressed each other as husband and wife, and passed and appeared as such, and were spoken of as such by witnesses for crown. Patteson, J., said, This is evidence on which the jury must say whether they are satisfied that the prisoners are in fact husband and wife, even though the woman has pleaded to indictment charging her as "single woman." She ought to have been described as wife, *not* as single woman. The woman was acquitted; the man convicted.

There are few cases in the American books, where the niceties of the English law of additions have been recognised. A want of an

¹ Wh. C. P. 7; State v. Hughes, 2 Har. & M'H. 479; Com. v. Sims, 2 Va. Cases, 374; Com. v. Lewis, 1 Met. 151; State v. Bishop, 15 Maine, 122.

² 2 Inst. 699.

³ Erskine v. Murray, 2 Ld. Raym. 1542.

⁴ State v. Bishop, 15 Maine, 122.

⁵ Leech's case, Cro. Jac. 167.

⁶ 2 Hawk. c. 23, s. 111; 2 Inst. 668; 1 Bla. C. 405; Ld. Raym. 1179; 6 M. & S. 38. R. v. Checketts, 6 M. & S. 38. As to yeomen, see 1 Bla. C. 406; 2 Inst. 595, 668.

⁷ R. v. Chapman, cited by Fortescue, J., in Williams v. Francis, Fort. R. 354.

addition *in toto* is ground for a motion to quash; but the additions "yeoman," "spinster," "gentleman," "labourer," may be relied upon universally in their proper places as sufficient. In Virginia, it is true, in an old case, the difference between "labourer" and "yeoman" was held material;¹ but the present tendency is to regard the existence of any additions, however general, as enough. Perhaps "yeoman" is the most general and unexceptionable. Where a slave is charged with an offence, the proper addition seems to be, "that a negro slave, the property of B." &c.²

(*Several defendants with same additions.*) If several defendants have the same addition, it is safest to repeat the addition after each name, applying it particularly to every one of them; and where a father has the same name and the same addition with a defendant, being his son, an indictment is defective unless it add the addition of *the younger* to the other additions; but where the father is a defendant without his son, it is clear that there is no need of the addition of *the elder*. Where L. W. Sr. and L. W. Jr. lived in the same town, on an indictment against L. W., evidence is not admissible of acts done by L. W. Jr., as it is to be presumed that the indictment means L. W. Sr.³

In Indiana it seems no addition is necessary.⁴ Thus Dewey, J., in one case said:⁵ "The objection urged against the indictment is, that the defendant is not described by the addition of his degree, or mystery, and place of residence. By the common law no *addition* was required in indictments against persons under the degree of a knight.⁶ The statute of additions enacts that the defendants shall be described by adding to their names their estate, degree or mystery, and place of residence, in all cases in which the *exigent* shall be awarded." It has been held, in the construction of this statute, that in prosecutions, which cannot be attended by the process of outlawry, the indictment need not give the *addition* of the defendant.⁷ The *exigent*, being a step in the proceedings of outlawry, is unknown to our law. It is therefore evident that the statute of additions, from its own terms, is not applicable to prosecutions in this state; and it is equally clear, that the common law does not require the defendant to be described by his addition.

(*Mystery at time of finding.*) The additions of estate, degree, and mystery of the defendant, are not sufficient, unless they be the same which he had at the time of the finding of the indictment; and in this respect such additions differ from that of place, which is sufficiently shown by naming the defendant *late* of such a place; and such additions must be expressed in such manner that it may plainly appear to refer to the party; and therefore it is not well expressed by the addition of his mystery, naming him son of A., of B., butcher, because butcher refers to it rather than to the son.⁸

¹ Com. v. Sims, 2 Va. Cases, 374.

² State v. Cherry, 3 Murph. 7.

³ State v. Vittum, 9 N. Hamp. 519; Jackson, *ex dem*; Pell v. Provost, 2 Caines, 165; but see Com. v. Perkins, 1 Pick. 388; State v. Grant, 22 Maine, 171; Coit v. Starkweather, 8 Conn. 280.

⁴ State v. McDowell, 6 Blackf. 49.

⁵ 1 Chit. C. L. 204.

⁶ 1 Hen. V., c. 5.

⁷ 1 Chit. C. L. 206; Bacon Abr. Indictment, ii.; *ibid.* Misnomer 2; R. v. Brough, 1 Wils. 244; Cro. Eliz. 148.

⁸ 2 Inst. 670; 2 Hale, 177.

(*How error in name of addition operates.*) The only mode by which at any time advantage can be taken by a prisoner of any error in his name or addition, is by plea in abatement;¹ though where no addition is given, or where there is no Christian name, the proper course is to move to quash. If he once pleads the general issue *not guilty*, he cannot afterwards take advantage of any such error, for he is precluded and estopped by his plea; and he is not obliged to take advantage of an error in these respects, by pleading in abatement, in order to make his acquittal a valid bar to any subsequent prosecution for the same offence; for if he be afterwards indicted for the same offence by another name or addition, he may show himself to be the same person by averment and evidence, and rely with success on his previous acquittal, notwithstanding the variance.² A plea in abatement must be verified by affidavit exposing the defendant's real name, additions, or mystery, as the case may be.³ An error as to one party of several, can only be taken advantage of, in any stage, by him, and does not affect the indictment as to the others.⁴ A plea in abatement was always of small benefit to the party accused, because he was bound to set out his true name and addition in it; and, if successful, might be indicted for the same felony; while if unsuccessful, in the English practice, sentence followed in misdemeanor;⁵ though here the inclination of authority, judging from the doctrines arising in demurrer, is that the judgment would be respondeat ouster.⁶

III. *Time and Place.*

Though some precise day, month, and year must be charged;⁷ yet it is not necessary to sustain the precise allegation in proof, if the time stated be previous to the finding the indictment;⁸ but it is material to show that the prosecution was commenced in due time, where it is enacted that it shall be commenced within a particular time;⁹ and where the offence is statutory, the time laid must be subsequent to the passage of the statute by which the offence was created. It is not, however, necessary to allege *time* to any charge of mere negation or omission.¹⁰ If the offence is laid on an uncertain or impossible day, or on a future day, or on different days, or on such a day as renders the indictment repugnant to itself, the objection is fatal in arrest of judgment even after verdict. Thus judgments were arrested when the date charged was November, 1801, and the 25th year of American Independence, the dates being inconsistent;¹¹ where

¹ *State v. Lorey*, 2 Brevard, 395; *Lynes v. State*, 5 Port. 236; *State v. Hughes*, 2 Har. & M.H. 479; see *State v. Newman*, 2 Car. Law Rep. 74; *Com. v. Dedham*, 16 Mass. 146; *Turns v. Com.* 6 Met. 225; *Com. v. Sayers*, 8 Leigh, 722; *R. v. Granger*, 3 Burr. 1617.

² 2 Hawk. c. 23, s. 103, 104.

³ *Com. v. Sayers*, 8 Leigh, 722; *R. v. Granger*, 3 Burr. 1607; *Rev. Stat. Mass.* c. 136, s. 31.

⁴ 2 Hale, 177.

⁵ 1 Chit. C. L. 461.

⁶ Wh. C. P. 68; *State v. Wilkins*, 17 Verm. 152; *Ross v. State*, 9 Miss. 696.

⁷ *State v. Beckwith*, 1 Stew. 318; Wh. C. P. 8; *R. v. Taylor*, 3 B. & C. 502.

⁸ *Starkie*, C. P. 58; *Shelton v. State*, 1 Stew. & Port. 208.

⁹ See *Salk.* 369, 378; *Carth.* 501; 5 Mod. 446; 1 Ld. Raym. 582; 10 Mod. 248.

¹⁰ *R. v. Holland*, 5 T. R. 616; *Starkie's C. P.* 61.

¹¹ *State v. Hendricks*, Conf. N. C. R. 369.

on a charge of compounding felony, the date of the commission of the offence was laid anterior to the date fixed for the commission of the larceny;¹ and where the crime was alleged to have been committed on September 30, 1033.² So if the date be left blank.³ Where, however, an indictment tried in the *first* year of George IV., stated the offence as having been committed "on the 20th July, in the *fourth year of the* reign of king George the Fourth," it was holden that the words "*fourth year of the*" might be rejected as superfluous, and the indictment sustained.⁴ Thus, where it was made a statutory misdemeanor to exhibit lights to persons at sea "between September and April," an allegation that the defendant exhibited lights *on the 9th March* was held sufficient, without specifically averring that he did so "*between* September and April."⁵ It seems that where an offence is laid contrary to the form of a statute, it is not necessary to state it to have been committed "after the passing of the act," though it took place very recently before, if the time when it took place is laid and proved to be after the act passed.⁶ If, in point of fact, an offence is committed after a day fixed by a statute, as that on and after which an offence may be laid and tried as if committed in the county in which the offender is apprehended, and the statute does not vary the nature and character of the offence, the having laid the day in the indictment before the day fixed by the statute, will not vitiate.⁷ Clerical errors, however, in setting forth the date, are liberally treated. Thus, "first March" was held sufficient for "first of March;"⁸ and where the caption was "December Sessions, 1818," the date was held sufficiently well expressed by the averment "in the year aforesaid."⁹ The setting forth the date in Arabic figures is enough.¹⁰ The word "*being*" (*existens*) will, unless necessarily connected with some other matter (*e. g.*) by the word *then*, relate to the time of the indictment, rather than of the offence.¹¹

An indictment for murder which stated that A. B., late of Bladen County, &c., with force and arms, in the county aforesaid, &c., was held to contain a sufficient description of the place where the murder was alleged to have been committed.¹²

In this country the usual practice in averring place is by charging the offence to have taken place in the county where it was committed.¹³ In Massachusetts, however, it has been held, that if from the terms of the location of a town or district by the act of incorporation, the court cannot conclude that the whole town, dis-

¹ *State v. Dandy*, 1 Brevard, 395.

² *Serpentine v. State*, 1 How. Miss. R. 260.

³ *State v. Beckwith*, 1 Stewart, 318; *State v. Roach*, 2 Hay. 552; *Tam v. State*, 3 Miss. 43.

⁴ *R. v. Gill*, R. & R. 431; see *R. v. Scott*, R. & R. 414; 1 Russ. C. M. 562, S. C.

⁵ 6 Geo. IV., c. 164, s. 52; *R. v. Brown*, M. & M. 163, per Littledale and Gaselee, Js.; see note to *Harding v. Stokes*, Tyr. & Gr. 599.

⁶ See judgment of Parke, B., in *Harding v. Stokes*, Tyr. & Gr. 605.

⁷ *R. v. Treharne*, 1 Mood. C. C. 298.

⁸ *Simmons v. Com.* 1 Rawle, 142.

⁹ *Jacob v. Com.* 5 S. & R. 315.

¹⁰ *State v. Gilbert*, 13 Vermont, 647; *State v. Smith*, Peck, 165; *State v. Hodgdon*, 3 Verm. 481.

¹¹ See 1 Chit. C. L. 2d ed. 220, and *R. v. Silversides*, 3 Q. B. R. 405; Wh. C. P. 8.

¹² *State v. Lamon*, 3 Hawkes, 175.

¹³ Wh. C. L. 77; *Duncan v. Com.* 4 S. & R. 448.

trict or unincorporated place lies in the same county, both town and county must be averred;¹ and in the same case it was declared, that the proper course in that state, in all capital cases, is to lay both county and town. In the city of New York the practice is to name the *ward*, in the city of New Orleans the parish.

(*Repeating time and place to every material fact.*) When time and place have been once named with precision, the words "*then and there*," referring to the last antecedent, will afterwards sufficiently express both.² Where the circumstances stated in indictments for misdemeanors are merely continuous, as in assaults with aggravation, one mention of time and place as applicable to *all* circumstances, will suffice; but this is otherwise in felonies where distinct and independent circumstances are necessary to the charge.³ But the mere qualification "*and*," without the word "*then*," is sufficient to extend the original allegation of time to the averment thus introduced.⁴ Where the time and place are immaterial, they may be introduced by the words *to wit*; though without a *scilicet* in such case, a variance would not prejudice; and as in cases where they are of the essence of the charge, a *scilicet* will not aid a variance in proof;⁵ it is rarely if ever useful.⁶

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county:⁷ but by the 2 & 3 Edw. 6, c. 24, s. 2, it was enacted, that the trial should be in the county where the death happened.

If a person be stricken and die in the county of A., and the body be found in B., it is to be removed into A. for the coroner of that county to take the inquest.⁸

IV. Force and Arms.

(*Vi et armis.*) Whatever may once have been thought of the magic of these words, it is now settled that they are wholly unessential. The statute⁹ clearly dispenses with them, even if before that they possessed any signification of importance; and the current of authority, even in those states where that statute is not in force, is to reject them altogether.¹⁰ In *Com. v. Martin*¹¹ the exception taken to the indictment, which was for assault and battery, was the want of these words, and though it does not distinctly appear so on the face of the report, the intimation of the court is clear that they are wholly unnecessary.

¹ *Com. v. Springfield*, 7 Mass. 9.

² Wh. C. L. 74; *Stout v. Com.* 11 S. & R. 177.

³ 2 Hale, 178; *R. v. Cotton*, Cr. El. 738.

⁴ Wh. C. L. 74.

⁵ *Busby v. Watson*, Bla. Rep. 1050.

⁶ *Dickinson's Q. S.* 6th ed. 212.

⁷ 2 Hawk. P. C. c. 25, s. 36.

⁸ 2 Hale, 66; 1 Ms. Sum. 53; 1 East, P. C. c. 5, s. 127, p. 361.

⁹ 37 Hen. 8, c. 8.

¹⁰ 2 Hawk. c. 25, s. 90; 3 P. Wms. 497; *State v. Kean*, 10 N. Hamp. 347; *State v. Munger*, 15 Verm. 290; 2 Tyler, 266; *Tipton v. State*, 2 Yerg. 542; *Territory v. McFarlane*, 1 Mart. 224; *State v. Thomson*, 2 Rice's Dig. 386.

¹¹ 2 Barr, 244.

V. "*Moved and seduced by the instigation of the devil.*"

These words, though usual, are superfluous, and may be omitted with safety.

VI. "*In and upon one E. F.*"

The description of the party against whose person or property the offence was committed. The indictment must be so certain as to the party against whom the offence was committed, as to enable the prisoner to know and understand who that party is, and what charge he is called on to answer.¹ And an error in setting forth the names of such party, is much more serious than in setting forth the name of the defendant himself, as the latter can only be taken advantage of by abatement, but the former is proper ground for acquittal, in cases of variance in evidence, or arrest of judgment in case of variance on record.² The mis-spelling of a surname, when its usual pronunciation is satisfied by the manner in which it is written in the record, as "Whyneard" for "Winyard," is sufficient;³ and in one case the court went so far as to say that "Harrison" was not a fatal variance from "Harris,"⁴ though in Pennsylvania,⁵ the extreme position was taken that "Burrall" was sufficient to arrest judgment where the proof was that the name was Burrill. The word, however, it must be observed, occurred in the copy of a lottery ticket, pretended to be set out in the indictment. A mere statement, it seems, of the Christian name, without any surname, will not suffice.⁶ Where the name and addition of the injured party cannot be ascertained, as where a body of a murdered person is found who cannot be identified, or goods are found on a highwayman, &c., the indictment may allege the party to be "to the jurors unknown."⁷ To support the description of "unknown," remarks Mr. Sergeant Talfourd, it must appear that the name could not well have been supposed to have been known to the grand jury.⁸ "Unknown" was held sufficient where there was evidence that the party injured, a bastard child who died at twelve days old unbaptized, had been called by its mother Mary Ann.⁹ A bastard which had never acquired a name, is sufficiently identified by showing the name of its parent thus—"a certain illegitimate male child then lately born of the body of A. B. (the mother.)"¹⁰ A bastard must not be described by his mother's name till he has acquired it by reputation.¹¹ A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother's surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder;¹² but where a bastard

¹ 2 Curw. Hawk. 319.² Whar. Prec. 10.³ R. v. Foster, R. & R. 412.⁴ State v. France, 1 Overton's R. 434.⁵ Com. v. Gillespie, 7 S. & R. 469.⁶ 2 Hawk. c. 25, s. 71.⁷ 2 Hale, 181; see 2 B. & Ald. 580.⁸ R. v. Stroud, C. & K. 187.⁹ R. v. Smith, 1 Mood. C. C. 295; S. C. 6 C. & P. 151.¹⁰ R. v. Mary and Jane Hogg, 2 M. & Rob. 380; see R. v. Hicks, 2 ib. 302, where an indictment for child-murder was held bad, for not stating the name of the child, or accounting for its omission.¹¹ R. v. Clark, R. & R. 358; Wakefield v. Mackey, 1 Phill. R. 133, contra.¹² R. v. Crans, 8 C. & P. 765.

was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment, styling it "*Eliza Waters*," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of *Waters* by reputation.¹ In the previous case² an indictment stated the murder of "*George Lakeman Clark*, a base-born infant male child, aged three weeks," by the prisoner, its mother. The child had been christened *George Lakeman*, being the name of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of *Clark*. The court held him improperly laid *Clark*, and as nothing but the name identified him in it, the conviction was held bad.³ However, in *Reg. v. Biss*,⁴ an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, &c., did make an assault, &c.," was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." It would have sufficed to state him as "a certain male child, &c., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B."⁵ Where a party is as usually known by one name as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name.⁶ So where an indictment charged the name of the person slain as Marie Gardiner, *alias* Maria Bull, and the proof showed her real name to be Maria Frances Bull, though she was generally known by the name in the indictment, it was held sufficient.⁷ If a false description be added to the name, as if a female feloniously married by a man whose wife is still alive, be described a "widow," when she is known to be a single woman, the error will be fatal, though no description of her was requisite.⁸ Where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed.⁹ But this was held immaterial, where it is sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz., the daughter of another Elizabeth Edwards.¹⁰ A variance in the name or identity of the party laid as injured, will entitle the prisoner to acquittal.¹¹

¹ *R. v. Ellen Waters*, 1 Mood. C. C. 457. (N. B. No baptismal register or copy of it was produced at either trial. *Semb.*: "Eliza" would have sufficed; see *R. v. Stroud*, C. & K. 187, and cases collected; *Williams v. Bryant*, 5 M. & W. 447.)

² *R. v. Frances Clark*, R. & R. 358.

⁴ 8 C. & P. 773.

³ See *R. v. Sheen*, 2 C. & P. 634.

⁵ See 2 C. & P. 635, n.; see, also, *R. v. Sheen*, 2 C. & P. 634.

⁶ *R. v. Norton*, R. & R. 509; *R. v. Berriman*, 5 C. & P. 601; *Anon.*, 6 C. & P. 408.

⁷ *State v. Gardiner*, Wright's R. 392.

⁸ *R. v. Deeley*, 1 Mood. C. C. R. 303; 4 C. & P. 579, (A. D. 1831.)

⁹ *Singleton v. Johnson*, 9 M. & W. 67.

¹⁰ *R. v. Peace*, 3 B. & Ald. 519.

¹¹ *Dickinson's Q. S.* 6th ed. 213. See also, generally, on this head, 2 Hale, P. C. 239, edited by Stokes and Ingersoll, n. 1.

It is not necessary to state the addition of the party killed, though it may sometimes be convenient to do so for the sake of distinction.¹

If a constable, watchman, or other minister of justice, be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally of murder by malice pre-pense.²

Where the case rests upon a neglect to provide sufficient food to the deceased, it must show that it was the duty of the prisoner to provide it. An indictment charged that E. E., the wife of J. E., in and upon E. E., the younger, being an infant of tender age, (to wit) of the age of six months, did feloniously make divers assaults, and that the said E. E., the elder, did feloniously neglect, &c., to give and administer to the said E. E., the younger, proper and sufficient food, by means of which neglecting, &c., (omitting any reference to the assaults) the said E. E., the younger, died. It was suggested that the indictment was bad, as it did not allege that it was the duty of the prisoner to maintain the child, neither did it state that the prisoner was the mother of the deceased, or in any way liable to take care of it. Patteson, J., said, "This indictment is bad; it does not state any duty, nor does it state that the prisoner was the mother of the deceased. Where the indictment charges an imprisoning it shows an obligation to maintain, for if you imprison a man you must feed him. But in this case the judgment must be arrested. Every word of this indictment may be literally true, and yet the prisoner and deceased might have been strangers to each other."³ So where a coroner's inquisition alleged that the prisoner did feloniously make divers assaults upon E. S., "she then and there being the natural child" of the prisoner, and that she neglected, &c., to give and administer to the said E. S. sufficient meat and drink; by means of which neglect E. S. died; and it was moved that the inquisition might be quashed, on the ground that it did not allege that it was the duty of the prisoner to find sufficient meat for the deceased; Taunton, J., after carefully perusing the inquisition, ordered it to be quashed.⁴

VII. "*In the peace of God and of the said state then and there being.*"

It is not necessary to allege that the party killed was "in the peace of God and of our lord the king," &c., though such words are commonly inserted, for they are not of substance, and perhaps the truth may be that the party was at the time actually breaking the peace.⁵

As will be seen more fully hereafter, where the subject of the *corpus delicti* is under consideration, it is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck. Thus, where it was doubtful, in a case where a mother was charged with throwing her child overboard, whether it was living or dead at the time, it was held that it rested on the government to show at the time it was living, it appearing that the mother was labouring under puerperal fever, and the idea of malice being thereby

¹ 2 Hale, 182.

² R. v. Mackally, 9 Rep. 68; 1 Hale, 460; 12 Rep. 17.

³ R. v. Edwards, 8 C. & P. 611.

⁴ R. v. Goodwin, MSS., 1 Russ. 563.

⁵ 2 Hawk. P. C. c. 25, s. 73; 2 Hale, 186; 1 Hale, 433.

excluded.¹ On an indictment for infanticide, it is necessary to show the child to be born alive.²

VIII. "*Feloniously, wilfully, and of his malice aforethought.*"

It is necessary to state, that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*,³ which, as we have already seen, is the great characteristic of the crime of murder; and it must also be stated, that the prisoner *murdered* the deceased. If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c., or *killed*, or *slew* the deceased, the conviction can only be for manslaughter.⁴

In an indictment for murder, where the killing is alleged to have been caused by a battery, it is necessary to allege an assault.⁵ In such case the time when the mortal stroke was given, and the time of the death, must be alleged, and it is not sufficient to allege that "he instantly did die."⁶

IX. "*With a certain knife.*" (*Means of death.*)

The question here opened is one of the most interesting connected with the doctrine of variance between pleading and evidence.

The common law rule in pleading the instrument of death is, that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and character, the contrary. Thus evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. A very happy illustration of this distinction is found in *Com. v. Haines*.⁷ The defendant was charged with having erected a stuffed *Paddy* with intent to excite the *Catholic* Irish; and he endeavoured to defend himself by proof that the device was a stuffed *Shelah*, and that the object was to excite the *Protestant* Irish. The instructions of the court were invoked as to whether there was a variance; and Gibson, J., said that if there was a mere averment of a *Paddy*, and evidence of a *Shelah*, the object and character of the figures being similar, there was no variance; but that if on the contrary, they were devices of an antagonistic character, the indictment could not be supported. Or, to state the principle more broadly, where the method of operation is the same, though the instrument is different, no variance exists; where the former is not the case, the rule is otherwise. The same reasoning applies to indictments for homicide. Where the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal;⁸ and the same if the indictment state a poisoning, and the evidence prove a starving. Thus where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave

¹ *U. S. v. Hewson*, 7 Bost. Law Rep. 361. ² *R. v. Poulton*, 5 C. & P. 239, ante, p. 98.

³ 2 Hale, 186, 187; *Steward*, P. C. 130; *Bradley v. Banks*, Yelv. 205.

⁴ *Whart. Prec.* 7, 8; though see *Anderson v. State*, 5 Pike, 445.

⁵ *Lester v. State*, 9 Miss. 666.

⁶ *Ibid.*

⁷ 6 Penn. Law Journ. 282.

⁸ *R. v. Briggs*, 1 Mood. C. C. 31.

him divers mortal blows and bruises, of which he died, and it appeared in evidence that the death was by the deceased falling on the ground, in consequence of a blow on the head received from the defendant; it was holden that the cause of the death was not properly stated.¹ But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material.² So if the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment.³ An indictment having charged that the prisoner, with both her hands about the neck of the deceased, the neck and throat of the deceased did squeeze and press, and by such squeezing, &c., did suffocate and strangle the deceased; and the evidence being that the prisoner suffocated the deceased by placing one hand on his mouth, and the other on the back of his head; Patteson, J., held that it was sufficient if the death was caused by suffocation, and that the evidence supported the indictment.⁴ And in another case the offence being charged to have been committed with a certain sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, Parke, B., held the indictment proved, and said the degree of sharpness was immaterial.⁵ And where an indictment for the murder of a bastard child stated that the defendant forced and thrust moss and dirt into its throat, mouth and nose, and that by forcing and thrusting the moss and dirt into the throat, mouth and nose of the child, the child was choked, &c., and it appeared that the child was not immediately suffocated by the moss and dirt, but that the moss and dirt caused an injury and inflammation in the throat, which closed the passage to the lungs and stomach, of which the child died; it was declared that the evidence supported the indictment, and that it was sufficient to state the proximate cause of the death, without stating the intermediate process resulting from that proximate cause.⁶ Where the prisoner was indicted for cutting the throat of the deceased, and a surgeon proved that what was technically called the throat was not cut, as the wound did not extend so far round the neck, Patteson, J., held that the indictment must be understood to mean what is commonly called the throat.⁷ Where the indictment alleged that the defendant suffocated the deceased by placing her hand on the mouth of the deceased, and the jury found that the death was caused by suffocation, but could not say how it was occasioned, Denman, C. J., held the indictment proved.⁸ But under an indictment for shooting with a pistol loaded with gunpowder and a leaden bullet, it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol. Bolland, B., Park and Parke, Js., held the indictment not proved.⁹ The same principle was

¹ *R. v. Thompson*, 1 Mood. C. C. 139.

² *R. v. Mackally*, 9 Co. 67a; *Gilb. Ev.* 231; *R. v. Briggs*, 1 Mood. C. C. 318.

³ *Ib.*, and see 2 Hale, 115, 185; 2 Hawk. c. 23, s. 84.

⁴ *R. v. Culkin*, 5 C. & P. 121.

⁵ *R. v. Grounseil*, 7 C. & P. 788.

⁶ *R. v. Tye*, R. & R. 345.

⁷ *R. v. Edwards*, 6 C. & P. 401.

⁸ *R. v. Waters*, 7 C. & P. 250.

⁹ See *R. v. Hughes*, 5 C. & P. 126.

applied where an indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his fist, and that the deceased fell upon a brick which caused his death.¹ In New York a far more liberal rule has been announced, it having been substantially held that the use of a pistol might be proved under an indictment charging the weapon to have been a knife.²

The evidence must show that the death was caused by the particular blow described and proved. Thus very recently, in a case remarkable for the conflict of opinion among the assembled judges on other points, as well as for the public interest excited by the trial, all the judges concurred in the opinion, that where certain assaults were put in evidence, and relied on by the crown, as being the cause of death, but where the clear surgical testimony was, that the death was caused by a blow on the head of which there was no evidence whatever, the defendants were entitled to an acquittal.³

An indictment, however, charging "that A. B. with a certain stick, &c., in and upon the head and face of C. D., then and there did strike and beat, giving to the said C. D. then and there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle *giving*, and the words *then and there*, connect the allegation with the mortal wound in the second clause.⁴ Where the allegation was, "that the prisoner in and upon M. F., &c., feloniously, &c., did make an assault with a certain gun, called a rifle gun, &c., then and there charged with gunpowder and two leaden bullets, which said gun he, &c., had and held, at and against the said M. F., then, &c., feloniously, &c., did shoot off and discharge, and that the said M. F., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., as aforesaid, did, &c., feloniously, &c., strike, penetrate and wound the said M. F., in and upon the left side of the said M. F., &c., giving to her the said M. F., &c., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., and by such stricken, &c., the said M. F., as aforesaid, one mortal wound in and upon the left side of the said M. F.," &c.; on a motion to arrest the judgment, on the ground that there was no sufficient averment that the gun was shot off, or that the contents were discharged, it was said that the inference seemed to be one of absolute certainty, that the contents of the gun were shot off and discharged, for there was nothing else to which the words "did shoot off and discharge" with a gun charged with gunpowder and leaden bullets, could be applied.⁵

Where an indictment describes the instrument which caused the death by two names, it is sufficient if it be proved to be either. The prisoner was indicted for manslaughter, in causing the death of a female, by negligently slinging a cask, which was described in the

¹ R. v. Kelly, 1 Mood. C. C. 113.

² People v. Colt, 3 Hill, 432.

³ R. v. Bird, 15 Jur. 193; 2 Eng. R. 448.

⁴ Gibson v. Com. 2 Va. Cases, 111.

⁵ State v. Freeman, 1 Spears, 57.

indictment as "a cask and puncheon;" and it was objected to the indictment on the ground that it was so described; but Parke, J., held, that if it was either, it was sufficient.¹

An indictment charged that the prisoner, contriving to murder J. S. with oil of vitriol, gave him a quantity thereof, and forced him to take it into his mouth and throat, knowing that it would occasion his death; by means whereof he became disordered; and by the oil of vitriol aforesaid, and by the disorder, choking, &c., occasioned thereby, died: and to this indictment there was a plea of *autrefois acquit*. The former indictment stated, that the prisoner, contriving to murder J. S. by poison, gave him poison; that is, oil of vitriol, and forced him to take, drink, and swallow it down, by means whereof he became sick; and by the poison so by him taken, drank, and swallowed down as aforesaid, and of the sickness occasioned thereby, he died. On demurrer, the plea was overruled, subject to a case, and the prisoner was tried and convicted. The case was argued; and it was urged, that on the first indictment swallowing must have been proved, which in fact had been negatived; and that proof of forcing J. S. to take it into his mouth and throat would not have been sufficient: but eleven judges (Wood, B., being absent) held otherwise. It was also urged, that upon the first indictment it must have been proved that oil of vitriol was a poison, which, in the second, would not be necessary: but the judges seemed to think, that the second indictment implied that oil of vitriol was a poison, and a pardon was recommended.²

In another case, it was averred, that the prisoner gave and administered poison: This was held to be supported by proof that the prisoner gave the poison to A. to administer as medicine to the deceased, and that A. neglecting to do so, it was accidentally given to the deceased by a child, the prisoner's intention to murder continuing. Upon an indictment for murder, which alleged that the prisoner feloniously, &c., did administer a large quantity of laudanum to a child, it appeared that the prisoner delivered to one S. Stephens, with whom the child was at nurse, about an ounce of laudanum, telling her that it was proper medicine for the child, and directing her to administer to the child every night a tea-spoonful thereof, which was quite a sufficient quantity to kill the child: the prisoner's intention in so doing, as shown by the finding of the jury, was to kill the child. Stephens took home the laudanum, and thinking the child did not require medicine, did not intend to administer it at all, and left it on the mantelpiece of her room. A few days afterwards, a little boy of the said S. Stephens, during her accidental absence, removed the laudanum from its place, and administered a much larger dose than a tea-spoonful to the child, in consequence of which the child died. The jury were directed that if the prisoner delivered the laudanum to Stephens, with intent that she should administer it to the child, and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that, if the laudanum was afterwards administered by an unconscious agent, while the prisoner's original intention continued, the death of the child, under such

¹ Rigmaidon's case, 1 Lew. 180.

² R. v. Clarne, 1 Brod. & Bing. 473.

circumstances, was murder by the prisoner, and that if the tea-spoonful was sufficient to produce death, the administration of a much larger quantity by the little boy would make no difference. The jury found the prisoner guilty, and, upon a case reserved for the opinion of the judges, whether the facts above stated constituted an administering of the poison by the child, it was held, under the circumstances of the case, as much in point of law an administering by the prisoner, as if she had actually administered it with her own hand.¹

In a late case in Alabama, it was held that an indictment charging A. with murder, by administering poison, need not state the particular poison administered; and if it do so state, it will not be necessary that the proof correspond.²

Where the prisoner was charged with murder by poisoning, and the indictment stated that she *delivered* the poisoned food to the deceased, it was ruled that such allegation was proved, by showing that the prisoner put the poison in some pudding meal, which was in a bowl in the milk house, from whence it was taken by the deceased, as usual, to make the pudding for the family, and afterwards eaten by her.³

In Pennsylvania, it was held to be not a sufficient reason for *allowing a writ of error, after conviction*, upon an indictment for a murder by poison, that the indictment did not aver that the prisoner knew the substance employed to be a deadly poison, though such an averment is always safe.⁴

A count of an indictment charging the death of a child to have been caused by its mother casting and throwing it on a heap of ashes, and leaving it there in the open air exposed to the cold air, whereby it died, was held good; but it was held that, if it had charged the death to have been caused by mere nonfeasance in the neglect of the prisoner's maternal duties, it would have been bad, unless the child were alleged to have been of such an age, or in such a situation, as to be unable to take care of itself.⁵

In one count of an indictment for murder, the death was stated to be by a blow of a stick, and, in another, by the throwing of a stone. The jury found the prisoners guilty of manslaughter generally, on both counts, and the judges held the conviction right; and that judgment could be given upon it; and it was said, that these are not inconsistent statements of the modes of death, but that, if they had been so, no judgment could have been given on the verdict.⁶

An indictment against a medical practitioner, charging that he made divers assaults on the deceased, (a patient) and applied wet cloths to his body, and caused him to be put into baths, it was held, that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased; and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty.⁷

¹ R. v. Michael, 2 Mood. C. C. R. 120; S. C., 9 C. & P. 356.

² Carter v. The State, 2 Carter, Ind. 617.

³ R. v. Nicholson, 1 East, P. C. c. 5, s. 116, p. 346.

⁴ Com. v. Earle, 1 Wharton, 525.

⁵ R. v. Waters, 2 Car. & Kir. 862.

⁶ R. v. O'Brien, 2 C. & K. 115; see ante, p. 113.

⁷ R. v. Ellis, 2 C. & K. 469.

If the instrument by which the homicide was committed be not known, it is enough for the indictment to aver such fact; and under the circumstances the want of specification will be excused, on the same principles as allow the non-setting out of a stolen or forged paper, when such paper is lost or in the prisoner's possession.¹ Thus, in a recent case of great and painful interest, the fourth count of the indictment averred that the defendant, "in and upon the said G. P., feloniously, wilfully, and of his malice aforethought, did make an assault, and him, the said G. P., *in some way or manner, and by some means, instruments and weapons, to the jurors unknown*, did then and there feloniously, wilfully, and of malice aforethought, deprive of life: so that he, the said G. P., then and there died." "The rules of law," said Chief Justice Shaw, when charging the jury, "require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and if the circumstances will not permit of a fuller and more precise statement of the mode in which the death is occasioned, this count conforms to the rules of the law."²

Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits. Thus he may vary the ownership of articles stolen in larceny;³ of houses burned in arson;⁴ or of the fatal instrument in homicide. The reason for this is thus excellently stated by Chief Justice Shaw:—

"To a person unskilled and unpractised in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps, a third, alleging a death by the joint results of both causes combined."⁵

The law on this point is thus summed up by Mr. Greenleaf, with his usual condensed perspicuity. "The mode of killing is not material. *Moriendi mille figuræ*. It is only material that it be shown that the deceased died of the injury inflicted, as its natural, usual and probable consequence. The nature of the injury is specifically set forth in the indictment; but as we have already seen,⁶ it is sufficient if the proof agree with the allegation in its substance and generic charac-

¹ Wh. C. L. 124, 223. ² Bemis v. Webster's case, 473, Com. v. Webster, 5 Cush. 535.

³ State v. Nelson, 29 Maine, 324.

⁴ R. v. Truman, 8 C. & P. 727.

⁵ Bemis Webster's case, 471, Com. v. Webster, 5 Cush. 535.

⁶ See Hawk. P. C. c. 46, s. 37.

ter, without precise conformity in every particular. Thus, if the allegation be that the death was caused by stabbing with a dagger, and the proof be of killing by any other sharp instrument;¹ or if it be alleged that the death was caused by a blow with a club, or by a particular kind of poison, or by a particular manner of suffocation, and the proof be of killing by a blow given with a stone, or any other substance, or a different kind of poison, or another manner of suffocation, it is sufficient;² for as Lord Coke observes, the evidence agrees with the effect of the indictment, and so the variance from the circumstance is not material. But if the evidence be of death in a manner essentially different from that which is alleged; as if the allegation be of stabbing or shooting, and the evidence be of death by poisoning; or the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone, the indictment is not supported;³ and whatever be the act of violence alleged, it must appear in evidence that the death was the consequence of that act. But if it be proved that blows were given by a lethal weapon, and were followed by insensibility or other symptoms of fatal danger, and afterwards by death, this is sufficient to throw on the prisoner the burden of proving that the death proceeded from some other cause.⁴

"Where the death is charged to have proceeded from a particular artificial cause, and the proof is, that it was only accelerated by that cause, but in fact proceeded from another artificial cause, the evidence does not support the charge. Thus, where the charge was of causing the death of a child by exposing it to cold, and the proof was, that it was found exposed in a field, alive, but with a mortal contusion on its head, and that it died in a few hours afterwards; it was held that if the death was only accelerated by the exposure, the charge was not supported.⁵ So if the indictment charges that the death was occasioned by two jointly co-operating causes, as, by starving and beating, both must be proved, or the indictment fails.⁶ But if the charge be of killing by the act of the prisoner as the cause, and the proof is that the deceased was sick, and must soon have died from that disease, as a natural consequence, the violent act of the prisoner only having accelerated his death, the charge is nevertheless supported.⁷

"Forcing a person to do an act which causes his death, renders the death the guilty deed of him who compelled the deceased to do the

¹ *R. v. Mackally*, 9 Rep. 65, 67; 2 Inst. 319. So if the charge be of murder by cutting with a hatchet, or by striking and cutting with an instrument unknown, evidence may be given of shooting with a pistol. *The People v. Colt*, 3 Hill, 432. And if the charge be of shooting with a leaden bullet, it is supported by proof of shooting with a load of duck-shot. *Goodwin's case*, 4 S. & M. 520.

² 2 Hale, P. C. 185; *R. v. Tye*, R. & R. 345; *R. v. Culkin*, 5 C. & P. 121; *R. v. Waters*, 7 C. & P. 250; *R. v. Grounsell*, id. 788; *R. v. Martin*, 5 C. & P. 128; and see *R. v. Heckman*, 1 D. 151; *R. v. O'Brian*, 2 C. & K. 115; *R. v. Warman*, id. 195.

³ *R. v. Thompson*, 1 Mood. C. C. 139; *R. v. Kelly*, id. 113. If the allegation be of shooting with a leaden bullet, and the proof be that there was no bullet, but that the injury proceeded from the wadding; quære whether the charge is supported by the evidence. And, see *R. v. Hughes*, 5 C. & P. 126.

⁴ *United States v. Wiltberger*, 3 Wash. 515.

⁵ *Stockdale's case*, 2 Lew. 220; 1 Russ. on Crim. 566.

⁶ *Ibid. R. v. Saunders*, 7 C. & P. 277.

⁷ *State v. Morea*, 2 Ala. 275.

act. And it is not material whether the force were applied to the body or the mind; but if it were the latter, it must be shown that there was the apprehension of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; and it need not appear that there was no other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take.¹ But if the charge be, that the prisoner "did compel and force" another person to do an act, which caused the death of a third party, this allegation will require the evidence of personal affirmative force, applied to the person in question. Thus, where it was stated in the indictment, that the prisoner "did compel and force" A. and B. to leave working at the windlass of a coal mine, by means of which the bucket fell on the head of the deceased, who was at the bottom of the mine, and killed him; and the evidence was, that A. and B. were working at one handle of the windlass, and the prisoner at the other, all their united strength being requisite to raise the loaded bucket, and that the prisoner let go his handle and went away, whereupon the others being unable to hold the windlass alone, let go their hold, and so the bucket fell and killed the deceased; it was held that this evidence was not sufficient to support the indictment.²

X.—"*Of the Value of.*"

The allegation of value is now immaterial, and need not be proved.³ In England, where deodands are still recognised, it may be necessary to introduce it; though as the same object does not exist in this country the reason fails.⁴

XI.—"*Which he, the said A. B., in his right hand then and there had and held.*"

Though the hand in which the instrument was held is set out in the old forms, it is clearly not necessary to prove the allegation.⁵

XII.—"*Him, the said E. F., in and upon the right breast of the said E. F.*"

The "him" which is here inserted, is not usually introduced; and counts have been sustained without it, where the express exception was taken.⁶

Where the indictment charged the death by cutting the throat, and a surgeon proved that the jugular vein was divided, but not the carotid artery, and that what he called the throat was not cut, the wound not having extended so far round the neck; it was held that

¹ R. v. Pittz, 1 Carr & Marshm. 284, per Erskine, J.; Rex v. Evans, 1 Russ. on Crim. 489; Rex v. Waters, 6 C. & P. 283. If a ship-master knowingly and maliciously compels a sick or disabled seaman to go aloft while he is in such a state of debility and exhaustion that he cannot comply without danger of death or enormous bodily injury, and the seaman falls from the mast and is drowned or killed, it is murder in the master, whether the means of compulsion were moral or physical. U. States v. Freeman, 4 Mason, 505. See ante, 118, 119.

² R. v. Lloyd, 1 C. & P. 301.

³ 1 East, P. C. s. 108, p. 341.

⁴ Hales' Pleas of the Crown, by Messrs. Stokes and Ingersoll, i. 424.

⁶ Com. v. White, 6 Binn. 183.

Arch. C. P. 10th ed. 407.

this was sufficient, for the term throat meant not that part of the throat which was scientifically called the throat, but that which was commonly called the throat.¹

It has been held that a count in an indictment for murder, charging that the prisoner did strike the deceased on the *left* temple, giving him a mortal wound on the *right* temple, &c., is inconsistent and void.² The count must state the part of the body to which the violence was applied; but the proof need not correspond with such statement.³

XIII.—“*Then and there feloniously, wilfully, and of his malice aforethought.*”

The time need not be formally repeated: “then and there” carries the averment back to the original date.⁴ Even if the “then and there” be omitted, it would seem that the court will still give judgment on the indictment, if the grammatical construction be such as to apply the time at the outset to the subsequent allegations.⁵ But where two distinct periods have been averred, the statement “then and there” is not enough; one particular time should be averred.⁶

It has been said that, in an indictment charging “that A. feloniously and of his malice aforethought, assaulted B., and with a sword, &c., then and there struck him,” &c., the first allegation of feloniously and of his malice aforethought, applied to the assault, runs also to the stroke to which it is essential,⁷ though the point has elsewhere been determined otherwise.⁸

A charge that A., on such a day, at, &c., made an assault upon B., and him with a knife feloniously struck, killed, and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault, for want of the words “then and there;” and for this and other exceptions an outlawry on this charge was reversed.⁹

Upon an indictment, alleging that the prisoner did an act which caused the death, it is sufficient to prove that the prisoner caused and procured the act to be done by an innocent agent. An indictment charged that the prisoner, a certain plaster made by the prisoner of certain dangerous ingredients, feloniously did place and fix upon the head of the deceased: the prisoner was proved to have applied two plasters over the head of the deceased, but a third, which was applied last before the deceased died, was applied by the child’s mother, in the absence of the prisoner, it being made with materials, which had been given by the prisoner to the mother for that purpose: it was objected that the indictment was not proved; but it was held that, though indictments often go on to say, that the prisoner “caused and procured” the thing to be done, yet if the plaster was made by the direction of the prisoner, that was enough.¹⁰

An inquisition against two prisoners, charging an injury done by

¹ R. v. Edwards, 6 C. & P. 401.

² Ibid.

³ State v. Cherry, 3 Murph. 7.

⁴ State v. Owen, 1 Mur. 452.

⁵ 1 East, P. C. c. 5, s. 112. p. 343; 2 Hawk. P. C. c. 23, s. 90; 2 Inst. 318.

⁶ R. v. Spiller, 5 C. & P. 333.

⁷ Dins v. State, 7 Blackf. 20.

⁸ Stout v. Com., 11 S. & R. 177.

⁹ Storrs v. State, 3 Miss. 45.

¹⁰ Resp. v. Honeyman, 2 Dallas, 288.

one of them on one day, and another injury done by the other on another day, and that the death arose from both, is bad, there being no averment that the one was present when the act was done by the other. An inquisition stated that Devett, on the 27th of May, struck the deceased on the head with a poker, and gave her one mortal bruise and contusion, and that Fox, on the 23d of June, kicked the deceased with her foot, and gave her thereby one mortal bruise and contusion, of which said mortal bruise and contusion so given by Devett, as well as of the mortal bruise and contusion so given by Fox, she languished, and afterwards of the said mortal bruises and contusions died: it was held that this inquisition could not be sustained.¹

XIV.—"*Did strike and thrust, giving to the said E. F., then and there with the knife aforesaid.*"

Wherever death is caused by physical violence, it is essential to the indictment that it should allege that the defendant struck the deceased;² and it must also be proved; though in Virginia it has been ruled that where the instrument was a dagger, "stab, stick and thrust," would be held equivalent to strike.³ It is not necessary, however, to prove that he struck him with the particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only would maintain the indictment.⁴

It appears to have been holden, that an indictment stating that the party of malice aforethought murdered, or gave a mortal wound, without saying that he *struck*, &c., was bad.⁵ But this doctrine has been questioned, though it is admitted to be the safest course to use the term where it may seem to be required by the nature of the fact.⁶

Where the death is occasioned by a wound, bruise, or other assault, the stroke must be expressly laid. But an indictment charging "that A. B. with a certain stick, &c., in and upon the head and face of C. D., then and there did strike and beat, giving to the said C. D. then and there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle giving, and the words then and there, connect the allegation with the mortal wound in the second clause.⁷

Where the indictment charged that the prisoners *with certain stones* of no value, which they in their right hands then and there had and held, in and upon the back part of the head of him, the said W. W., then and there feloniously, &c., and of their malice aforethought, *did cast and throw*, and that they with the stones aforesaid, so as aforesaid cast and thrown, the said W. W., in and upon the

¹ R. v. Devett, 8 C. & P. 639.

² See 5 Co. 122 a; 2 Hale, 184; 2 Hawk. c. 23, s. 82.

³ Gibson v. Com. 2 Va. Cases, 111.

⁴ Arch. C. P. 10th ed. 486.

⁵ R. v. Long, 5 Co. 122 a.

⁶ 2 Hawk. P. C. c. 23, s. 82; Sum. 207; Yelv. 28.

⁷ State v. Owen, 1 Murph. 452.

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part of the head of him the said W. W., feloniously, &c., did cast, &c., an objection was taken that the mode of causing the death was not properly stated. But the judges, upon a case reserved, were unanimously of opinion that the cause of the death was sufficiently stated; it being clear that the *stones* were what were cast thrown at the deceased; and the word *with* might be rejected, the words *cast and throw* might be considered to be used as neuter verbs.¹

An indictment charging "that the defendant, with a certain stone which he held in his right hand, in and upon the right side of the head of the deceased, feloniously, &c., did cast and throw, and that the defendant with the stone aforesaid, so as aforesaid cast and thrown, the deceased in and upon the right side of the head feloniously did strike," &c., was held to contain a sufficient allegation that the defendant threw the stone and struck the deceased with it.² Where the allegation in an indictment for murder, was, "that the prisoner in and upon M. F., &c., feloniously, &c., did make an assault with a certain gun, called a rifle gun, &c., then and there charged with gunpowder and two leaden bullets, which said gun, he, &c., had held, at and against the said M. F., then, &c., feloniously, &c., shoot off and discharge, and that the said M. F., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun so loaded, to, at and against the said M. F., as aforesaid, did, feloniously, &c., strike, penetrate and wound the said M. F., in upon the left side of the said M. F., &c., giving to her, the said M. F., &c., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., and by such striking, &c., the said M. F. as aforesaid, one mortal wound in and upon the left side of the said M. F.," &c.; on a motion to arrest the judgment, on the ground that there was no sufficient averment that the gun was shot off, or that the contents were discharged, it was said that the inference seemed to be one of absolute certainty, that the contents of the gun were shot off and discharged, for there is nothing else to which the words "did shoot off and discharge" with a gun charged with gunpowder and leaden bullets, could be applied.³

A. be indicted as having given the mortal stroke, and B. and C. present aiding and assisting, and upon the evidence it appears that A. gave the stroke, and A. and C. were aiding and assisting, or it be proved which gave the stroke, the charge is proved, for in law it is the stroke of all.⁴ So if a prisoner be indicted for strangling the deceased with her own hands, and upon the evidence it turns out the deceased was strangled by some one else in the presence of the prisoner, who was privy to it, and so near as to be able to assist, is sufficient.⁵

An indictment for manslaughter alleged that T., on the 26th of December, at Groton, in the county of Middlesex, "in and upon one then and there being, feloniously and wilfully did make an assault, and with a stone, which said T. then and there had and held,

¹ *v. Dale*, Hil. T. 1824, 1 R. & M. C. C. 5; *White v. Com.* 6 Bin. 179.

² *Com. v. White*, 6 Binney, 183.

³ *State v. Freeman*, 1 Spears, 57.

⁴ *Russ. on Cr.* 510; 1 Hale, 462.

⁵ *R. v. Culkyn*, 5 C. & P. 121.

in and upon the head of the said L., then and there feloniously and wilfully did cast and throw, and with the said stone, so as aforesaid cast and thrown, the aforesaid L. then and there feloniously and wilfully did strike, penetrate and wound, giving to the said L., by casting and throwing of the stone aforesaid, in and upon the head of said L., a mortal wound;" &c. It was held that it was sufficiently averred that T. gave L. a mortal wound, on the 25th of September at Groton.¹

Where the nature of the injury does not admit of the averment of a stroke, it is enough if the artificial cases themselves are correctly enumerated. Thus, where the indictment alleged in several counts that the prisoner administered noxious and deleterious substances to the deceased, and that he died of the sickness occasioned thereby; and the evidence was, that the prisoner had administered to the deceased, while ill of small-pox, large quantities of Morrison's pills, and his death was thereby accelerated: it was objected that the indictment was not supported by the evidence, which proved nothing more than that the deceased died of a natural disorder, accelerated by improper treatment; that the charge in the indictment was a different one, viz., that the party died solely of a mortal sickness caused by the medicine and improper treatment; that the indictment was framed as though the small-pox had nothing to do with the cause of death; and yet that there was no evidence whatever to show that the party would have died but for that distemper: it was answered that it was not necessary to allege more than the act with which the prisoner was charged; that it was not the practice to allege the state of body in which the deceased might be, however much that state of body might assist to render the act of the prisoner fatal; and the indictment was held good, as all the witnesses agreed that the death was accelerated by the pills.²

In a case where the death proceeded from suffocation, by the swelling up of the passage of the throat; and such swelling proceeded from wounds occasioned by forcing things into the throat; it was held that the statement might be that the things were forced into the throat, and the deceased thereby suffocated; and that it was not necessary to mention the immediate cause of suffocation; namely, the swelling of the throat. The indictment charged a murder, by forcing and thrusting moss and dirt into the mouth, nose, and throat of a child, by which forcing and thrusting of the moss and dirt into the mouth, &c., the child was then and there suffocated. It appeared that this forcing of the moss and dirt did not produce immediate strangulation, and that they were removed before the child died; but the forcing them into the throat made the throat swell so as to choke up the passage; and then the child died of suffocation. Upon a case reserved, the judges held, that as the primary cause of the suffocation was the forcing the moss into the throat of the child, it was not necessary to state in the indictment the intermediate process, viz., the swelling up of the passage of the throat, which occasioned the suffocation, such swelling having arisen by forcing the moss into the throat.³

¹ *Tums v. Com.* 6 Metcalf, 225.

² *R. v. Webb*, 2 Lewin, 196; *S. C.* 1 M. & Rob. 405.

³ *R. v. Tye*, Russ. & Ry. 345.

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V. "*In and upon the said left side of the heart of him the said*"

ie indictment must show in what part of the body the wound inflicted, but if the wound be stated to be on the right side, and roven to be on the left, the variance is not fatal.'

VI. "*One mortal wound of the breadth of three inches, and of*
lepth of one inch."

was formerly held to be necessary to insert a full description of wound.² The present opinion, however, is to require no such particularity. Thus, where an indictment, after stating that the prisoners jointly and of their malice aforethought, made an assault on the y killed, and threw him down upon the ground; and with their s and feet, while he was upon the ground, in and upon his head, ach, breast, belly, back, and sides, feloniously, &c., divers times, great force and violence did strike, beat, and kick, and with hands, feet, and knees did strike, push, press, and squeeze, proceeded thus,—“giving to the said J. D. then and there, as well by pulling, pushing, casting, and throwing of him, the said J. D. n, unto and upon the ground as aforesaid, and by the striking, ing, and kicking of him the said J. D., whilst he was so lying being upon the ground as aforesaid, in and upon the head, sto- 1, breast, belly, back, and sides, of him the said J. D. as afore- as also by the striking, pushing, pressing, and squeezing of him aid J. D., whilst he the said J. D. was so lying and being upon the nd as aforesaid, in and upon the belly, breast, stomach, and sides m, the said J. D., with the hands, knees, and feet of them the said .and B. M. in manner aforesaid, several mortal bruises, lacerations, wounds, in and upon the belly, breast, stomach, and sides, of him aid J. D.;" of which said several mortal bruises, lacerations, and ids, the said J. D., from, &c. did languish, &c.; and then it averred eath and the murder in the usual form. A conviction having taken y, the prisoner's counsel moved in arrest of judgment, that the tment was insufficient in stating only that there were several al bruises, lacerations, and wounds, on several parts of the body, hich the party languished and died; that a considerable degree rtainty was necessary in the statement of the wounds on the face ie indictment, and of the situation, length, &c. of each; that it necessary to describe the particular parts of the body on which ound or wounds is or are alleged to be; that charging a wound e inflicted on the side or sides of a man is bad, without more par- arity, as *non constat* whether it is to be taken to be the side or of the body, or of the head, or of any or of what limb; that the tment, according to ancient forms, should so state the fact as that ger might be placed upon the part of the body where the wound scribed to be; that this was still requisite, although a conviction t take place upon evidence varying from it, for the particulars t to be stated accurately, according to the facts as they are sup-

Hale, 186; Archb. C. P. 384.

Hale, 185, 186; 2 Hawk. P. C. c. 23, s. 80, 81; Trem. Ent. 10; Staundf. 78 b, 79 a; 40, 41; 5 Co. 120, 121 b, 122; Cro. Jac. 95; Stark. Cr. L. 375, 380.

posed to be, for the previous information of the court, and of the party charged, with a view to a due investigation, and in order that it might appear, by such statement of particulars, that a due inquiry had been made by the grand jury or the coroner's inquest as to these circumstances, before a party should be put to undergo the pain and peril of a trial; and that the facts ought not to be wantonly or purposely varied from in such statement; and 2 *Hale*, P. C. 185, 186, was cited and observed upon. Judgment was respited; and the matter submitted to the consideration of the judges, who met twice for the purpose of considering the case. At the second meeting the majority of the judges, *viz.*, Gaselee, J., Hullock, B., Garrow, B., Burrough, J., Park, J. Bayley, J., Graham, B., Alexander, L. C. B., Best, L. C. J., and Abbott, L. C. J., held the conviction right, as it appeared in several old precedents, that the length, breadth, and depth of the wounds were not stated; and also that Mr. Justice Lawrence had instructed the clerk of assize upon the Oxford circuit to omit these particulars when there were more wounds, and that his instructions had been followed. And they held that, although they might have felt great difficulty had the precedents been uniform; yet, as there were precedents against the objection, they might consider whether common sense required a statement of these particulars: and as the statement, if introduced, need not be proved, they thought it unnecessary. Littledale, J., and Holroyd, J., differed from the other judges, and thought the indictment bad.¹

Where the death was occasioned by a bruise, a description of its dimensions, &c., is not necessary.² It would seem, however, that it is not necessary in general that the description of the wound should be accurately supported by evidence.³

Where an indictment stated the length and breadth of a wound, but not the depth, and it was objected that as there was only one wound, the depth ought to be stated; it was held that it was not necessary, for if common sense did not require it where there were several wounds, common sense did not require it where there was only one.⁴ So where an indictment merely alleged the giving of "one mortal bruise," and it was urged that the dimensions of the bruise ought to have been described, Mr. J. Parke said, "I am disposed to go further than the judges in *Mosley's* case, and to say that it is not necessary to describe the bruises at all, such rule being, in my judgment, most consistent with common sense."⁵

The substance of the allegation of a mortal wound, however, must be preserved; and an omission in this respect will be fatal. Thus, if it be stated that the death was caused by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound or bruise, whereof he died;⁶ and an indictment setting forth that the prisoner choked the deceased, *quâ suffocatione obiit*, instead of *de quâ suffocatione*, &c., was adjudged to be erroneous.⁷ And if the means of the death be alleged to be by poi-

¹ *R. v. Mosley*, R. & M. C. C. 97.

² *State v. Owen*, 1 Mur. 452; see *State v. Moses*, 2 Dev. 452, contra.

³ 2 *Hale*, 186; 1 Mood. C. C. 97.

⁴ *R. v. Tomlinson*, 6 C. & P. 379.

⁵ *Turner's case*, 1 Lewin, 177.

⁶ 2 *Hale*, 186.

⁷ 1 Roll. 137.

it should be averred, after stating particularly the manner in which the poison was administered, that the party died of the poison taken, and the sickness thereby occasioned.¹

there is a substantial agreement, however, it is enough. Thus, where the indictment alleged that a woman "with both *her* hands *about the neck*" of a child, did press and squeeze, and thereby suffocate and strangled the child, it was held sufficient to prove that the child came by its death by strangulation or suffocation, and it is not necessary to show that the prisoner should have done it with her own hands, for if it was done by any other person in her presence, she was privy to it, and so near as to be able to assist, that is sufficient.² Where a count charged the death to be by suffocation, by the prisoner having placed her hand on the mouth of the deceased, and the finding was, that the deceased had died from suffocation and pressure; it was held that, if any violent means were used to stop respiration, and the death was thereby caused, the count was proved.³

Where, also, where the indictment stated that the prisoners administered a large quantity of a certain deadly poison, called white arsenic to the deceased, and that she swallowed down into her body white arsenic, by means of which swallowing down the said white arsenic she became mortally sick, of which said mortal sickness languished from, &c., until, &c., on which day she "of the said mortal sickness died:" it was objected, in arrest of judgment, that the indictment ought to have alleged that she died of the poison and the sickness occasioned thereby, and that it was not sufficient to say that by reason of the swallowing of the poison she became mortally sick, and that she afterwards died of the said mortal sickness. The judge, J., overruled the objection, and, upon a case reserved, the court held that the indictment was good.⁴

In all these cases it should be remembered that, even when it is considered necessary to state the manner and place of the hurt, and the nature, in order that the indictment might be good as to its form; yet, if it appeared upon the evidence that the party died of another kind of wound, in another place, the indictment was nevertheless maintainable.⁵

An indictment which stated the death to have been caused by means of smothering an infant, but omitted to aver that a mortal wound or bruise was given, was holden to be defective.⁶

VII. "*Of which said mortal wound the said E. F. from, &c., to, at, &c., did languish, and languishingly did live.*"

This averment is a mere matter of surplusage, and may be entirely left out.⁷

VIII. "*On which said, &c., at, &c., of the wound aforesaid, did*

an indictment upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and

East, P. C. c. 5, s. 111, p. 343; 2 Hawk. P. C. c. 23, s. 82, 83.

1. v. Culkin, 5 C. & P. 121.

3 R. v. Waters, 7 C. & P. 250.

2. v. Sandys, 1 Rus. on Cr. 561.

5 2 Hale, 185, 186; 2 Hawk. P. C. c. 23, s. 81.

3. v. Lad, 1 Leach, 38; S. C. 1 C. & Mars. 345.

4. enn. v. Zell, Addison, 171, 175.

a day after the wound is inflicted, the law presumes that it proceeded from some other cause.¹

The indictment at common law should therefore aver that the deceased died in the county in which the indictment is found.² If a person be stabbed in Virginia, and die of his wounds in another state, he cannot be tried for murder in any county in Virginia; but he may be tried for the stabbing in the county where the blow was inflicted.³

Proof that the violence inflicted by the defendant was the cause of the death of the deceased is necessary, though positive proof that life continued to the moment of the fatal blow, is not always necessary. The presumption that a person proved to have been alive at a particular time, is still so, holds until it is rebutted by the lapse of time, or other satisfactory proof.⁴

Where the stroke was at one time or place, and the death at another, if the day be specially alleged, it should be that on which the party died, and not that on which he was stricken; for until he died it was no murder.⁵

An indictment which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and "of the said mortal sickness died," is good, without also stating that the deceased died of the poisoning.⁶

A coroner's inquisition merely alleging, that the deceased of the said mortal shock, "at the parish aforesaid, in the county aforesaid, *instantly* died," is bad.⁷

Where an indictment alleged that Cox made an assault on the deceased at the parish of All Saints, in Middlesex, and that the deceased at the parish of St. Paul's in the county of Kent, did languish, &c., and that he there died, and that Hargrave and others were *then and there* present aiding, &c., Cox in the commission of the said felony; it was held that the word "there" referred with sufficient certainty to the parish of All Saints, where the blows, which constituted the felony, were given.⁸

An indictment stated that the mortal wound was inflicted on the 7th November, 1845, and that the deceased languished on, until the 8th November in the year aforesaid, and then said, "on which 8th day of *May*, in the year aforesaid, the deceased died." To this indictment the prisoner pleaded not guilty. It was held, that the insertion of May for November was a mistake, apparent on the face of the indictment, and would not exclude proof of the death, subsequent to the 7th November, or be cause for arresting the judgment.⁹

The dates here stated in the indictment need not be proved as laid, though an indictment upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded

¹ *State v. Onell*, 1 Dev. 139. See ante, p. 241.

² 2 Hawk. B. 2, c. 25, s. 36; 1 Ch. C. L. 178; 3 *Ibid.* 732; *State v. Onell*, 1 Dev. 139.

Com. v. Linton, 2 Va. Cases, 205.

³ *Com. v. Linton*, *Ibid.*

⁴ *Com. v. Harman*, 4 Barr. 269.

⁵ 1 East, P. C. c. 5, s. 117, p. 347.

⁶ *R. v. Sandys*, 1 Car. & Mars., 345.

⁷ *R. v. Brownlow*, 11 A. & E. 119.

⁸ *R. v. Kargman*, 5 C. & P. 170.

⁹ *Ailstock's cases*, 3 Gratt. 650.

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some other cause.¹ All that is necessary to be proved, in order to support this part of the indictment is, that the deceased died of wounds or wounds given him by the defendant, within a year and after he received them; as otherwise the case is not made out.² As already been seen, where it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, the defendant is not responsible; though if a man be wounded, and the wound turn to a gangrene or fever for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it become fatal from the refusal of the party to undergo surgical operation,³ this is homicide, and murder or not, according to the circumstances under which the wound was given.⁴ An indictment against two defendants, which states the death to be the result of different injuries inflicted by each of the defendants separately, on different days, is bad.⁵

"And so the jurors aforesaid, &c., do say, that the said A. B. killed the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his own malice aforethought, did kill and murder."

The concluding averment "and so the jurors do say," does not require either time or place to be alleged in it.⁶

In an indictment for murder, it is indispensable that the killing and murder should be charged to be done "with malice aforethought."⁷ In a late case, however, in Arkansas, it seems to have been thought that the words "and wickedly did kill and murder, against," &c., are sufficient, without the words "of his malice aforethought."⁸

An indictment concluding with an allegation that the prisoner did commit murder, omitting the name of the deceased in such conclusion was held in Indiana to be insufficient.⁹

Where an indictment for murder, after correctly charging the principal in the first degree, proceeded to allege that "at the time of the felony and murder was committed, (to wit,)" &c., precisely in the same terms as in the preceding case, and, upon demurrer, it was objected that the indictment was bad, and that case was relied upon as authority; Coltman, J., said that it was a grave authority in support of the objection, but he would reserve the point as the case was so serious: it was further objected that the bad English made the averment insufficient, but Coltman, J., was inclined to think that the word "might" might be rejected; he, however, would reserve this point also.¹⁰ Where an inquisition, after correctly charging the principal in the first degree, alleged that the two other prisoners, at the time of the felony aforesaid "(to wit) on the day and year aforesaid, at the parish of," &c., in the county aforesaid, were feloniously present, then and there abetting, aiding, and assisting, the said N.," &c., it was objected that the word "feloniously," only applied to "present," and not to abetting, aiding, and assisting;" and it was held that the inquisition was bad on this ground.¹¹

¹ *ate v. Onell*, 1 Dev. 139.

² *v. Holland*, 2 M. & Rob. 351.

³ *v. Devitt*, 8 C. & P. 639.

⁴ *m. v. Gibson*, 2 Va. C. 70; though see, *per contra*, *Anderson v. State*, 5 Pike, 445.

⁵ *Anderson v. State*, 5 Pike, 445.

⁶ *v. Phelps*, 1 Russ. on Cr. 564; 1 C. & Mars. 180. In consequence, however, of the acquittal of the principal in the second degree, no further action was had. *Ibid*.

⁷ *v. Nicholas*, 7 C. & P. 538.

⁸ 1 Hawk. c. 23, s. 90.

⁹ 1 Hale, 421.

¹⁰ *R. v. Nicholas*, 7 C. & P. 538.

¹¹ *Dias v. State*, 7 Blackf. 20.

In a late case, the second count of the indictment charged J. O. B. that he, "on the 27th of May, feloniously, and of his malice aforethought, struck the deceased with a stick, of which said mortal wound the deceased died on the 29th day of May; that T. R. D. D., &c. on the day and year first aforesaid, at the parish aforesaid, feloniously and of their malice aforethought, were present aiding and abetting the said J. O. B., the felony last aforesaid to do and commit;" and concluding "the jurors, &c., say that the said J. O. B., T. R. D. D., &c., him the deceased in manner and form last aforesaid, feloniously, and of their malice aforethought, did kill and murder." The third count charged T. R. that he "on the 27th day of May, a certain stone feloniously, and of his malice aforethought, cast and threw, and which said stone, so cast and thrown, struck deceased, of which mortal blow the deceased died on the 29th of May, and that J. O. B., D. D., &c., were present, aiding and abetting," &c., as in the first count. It was objected—1st, that the indictment was inconsistent, in charging the principals in the second degree with committing the felony at the time of the stroke, whereas it was no felony till the time of the death; and, 2d, that the general verdict of guilty, left it uncertain which was the cause of death, the stick, or the stone, and that, therefore, no judgment could be entered on either. It was held—1st, that the form of the indictment was good; and, 2d, that the alleged generality was immaterial, the mode of death being substantially the same.¹

If several be charged as principals, one as principal perpetrator, and the other as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present, is, in legal consideration, the injury of each and every one of them.² If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state that the mortal injury was committed by him who is absent, or no more, yet if it be subsequently alleged that those who are indicted were present at the perpetration of the crime, and did kill and murder the deceased, by the mortal injury so done by the actual perpetrator, it will be sufficient.³

XX.—"Contrary to the form," &c.

As a general rule it is not necessary that indictments for murder should conclude *contra formam statuti*. In England it is held that on an indictment for manslaughter not concluding *contra formam statuti*, the punishment provided by the 9 Geo. 4, c. 31, s. 9, may be awarded, for such conclusion is only necessary where a statute creates the offence, not where it merely regulates the punishment.⁴

In Pennsylvania, Tennessee, North Carolina and Missouri, and in fact, generally, the statutory penalty can be inflicted after conviction on an indictment for murder at common law.⁵

¹ R. v. O'Brian, 1 Den. C. C. 9.

² Fost. 551; 1 East, P. C. 350; State v. Fley & Rochelle, 2 Brev. 338; State v. Mair, 1 Cox, 453; see ante, p. 155, *et seq.*

³ State v. Fley & Rochelle, 2 Brev. 338.

⁴ R. v. Barry, 1 Moo. & Rob. 463.

⁵ Com. v. White, 6 Binn. 183; Mitchell v. State, 5 Yerg. 340; Hines v. State, 8 Hum. 597; McGee v. State, 8 Mis. 495; State v. Drinkley, 3 Iredell, 117.

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New York a common law indictment for murder is proper under the revised statutes; but a defendant cannot be convicted on an indictment of a felonious homicide, with malice aforethought, as the evidence is such as to bring the case within the statutory definition of murder.¹

The general provisions in this respect have been thus laid down: the old reason of the ordinary conclusion of an indictment at common law, "*against the peace of our said lady the queen, her crown dignity,*" was that these words were always necessary in order to show to whom the forfeiture accrued. Whether in misdemeanor,² non-law felony,³ or felony created by statute.⁴ The only exception was in an indictment for a mere nonfeasance at common law, and it is said their omission would not prejudice;⁵ and they are always necessary in an offence against a statute. In this country, though the reason no longer works, the form is preserved, and is in many instances made imperative by constitutional enactment, as will be seen in the next chapter. In offences of all characters, the "*contra pacem*" is essential; and the point on which any discretion may be exercised is in the commission or introduction of the conclusion, "*tra formam statuti.*" And here it may be observed, that in all cases of doubt it is proper to introduce this conclusion, and even in cases at common law, it may always be disregarded as surplusage.

In a large class of offences, however, its introduction is necessary. Thus, where an offence is created, or where a misdemeanor is raised into a felony by statute, the words "contrary to the provision of the statute in such case made and provided," *must* be inserted either before or after the words "against the peace," &c.⁶ Where the matter charged is no offence at common law, the omission of these words will so entirely vitiate, that no judgment can be rendered on it.⁸ For every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the indictment, by reference to a statute, shows that he means to proceed otherwise; and without such express reference, if it be no offence at common law, the court will not look to see if it be an offence by statute.⁹ Where the matter charged was an offence at common law, and is afterwards prohibited by statute without being altered in degree, as from misdemeanor to felony, though the statute provides some new moral or other punishment, *e. g.* for perjury by 5 El. c. ix. or for forgery by 7 & 8 C. IV. c. 28, s. 11;¹⁰ the omission of *contra formam*

¹ People v. Enoch, 18 Wend. 159.

² R. v. Taylor, 3 B. & C. 502.

³ Cook v. R. & R. C. C. 176; 2 Russ. C. & M. 172.

⁴ id.; 1 Bla. C. 116.

⁵ Per Holt, C. J.; Fortescue, 131 R.

⁶ Raym. 149, 1164; R. v. Matthews, 5 T. R. 162, 4 Jb. 202; 1 Saund. 135, n. 3;

⁷ Buckman, 8 N. Hamp. 203; Knowles v. State, 3 Day, 103; State v. Cruiser,

⁸ Wis. 108; Southworth v. State, 9 Conn. 560; Com. v. Gregory, 2 Dana, 417; Com.

⁹ v. 16 Mass. 385; Resp. v. Newell, 3 Yeates, 407; Penn. v. Bell, Addison, 171;

¹⁰ 190; Alleyne, 43; 1 Salk. 212, 213; 5 T. R. 162; 2 Leach, 584; 2 Salk. 460;

Raym. 1163; 4 T. R. 202; 2 Hawk. c. 25, s. 115; Bacon Abr. Indictment, H. 2;

¹¹ Just. Indictment, ix.; Haslip v. State, 4 Hay. 273.

¹² Hale, 192; 2 Hawk. c. 25, s. 116; 1 Salk. 370; 2 R. & R. 38.

¹³ Hale, 172, 189, 192.

¹⁴ Lawrence, J., in Lee v. Clark, 2 East, 333; Doct. Plac. 332; 2 Hawk. c. 25,

¹⁵ R. v. Deacon, R. & M. N. P. C. 27.

¹⁶ v. Blea, 8 C. & P. 735.

statuti will not wholly avoid the indictment, but judgment may pass for the punishment inflicted in such case by the common law.¹

Numerous distinctions have been taken in the old books as to the proper conclusion where there were more statutes than one referring to the offence, whether it should be contrary to the form of the statute or statutes; and the English doctrine used to be that if one statute be relative to another, as where the former makes the offence, and the latter adds a penalty, the indictment should conclude *contra formam statutorum*.² The more recent authorities, however, seem to countenance the opinion that in all cases a conclusion in the singular will suffice.³ If one statute subjects an offence to a pecuniary penalty, and a subsequent statute makes it a felony, an indictment for the felony concluding against the form of the statute in the singular, is right.⁴

Besides these necessary parts of the conclusion, it was formerly usual to introduce others of mere moral inference, as "to the great displeasure of Almighty God," "to the evil example of all others," and "to the great damage" of the party directly aggrieved; but these are all clearly unnecessary, and should be omitted.⁵

The subject of the "*contra formam*" conclusion in cases of murder, is thus learnedly discussed by Chief Justice Ruffin of North Carolina.⁶ "The act of 1777," he said, "in requiring pleas of the state to be commenced in the district wherein the offence was committed, but followed the principle of the common law, that the cognizance of crime is local. It seems to the court, that the subsequent act of 1831, was intended for the sole purpose of modifying that provision in particular cases, by conferring a jurisdiction to try indictments for murder or manslaughter, where the whole offence was not perpetrated or was not fully constituted within one county or within this state. It provides,⁷ first, that 'in all cases of felonious homicide, where the assault shall have been committed in one county of this state and the person assaulted shall die in any other county thereof, the offender shall and may be indicted and punished for the crime in the county where the assault was made;' and in the next place, that 'in all cases of felonious homicide, where the assault shall have been committed in this state, and the person assaulted shall die without the limits thereof, the offender shall and may be indicted and punished for the crime in the county where the assault was made, in the same manner to all intents and purposes as if the person assaulted had died within the limits of this state.' There is no offence newly created, or raised to a higher offence, nor an additional punishment annexed, in any of which cases, it is admitted, the indictment ought to conclude *contra formam statuti*. In respect to a case which occurs wholly in this state, the act is like that of 2 and 3 Ed.

¹ 2 Hale, 190, 192; 1 Chit. C. L. 290, 1st ed.; Arch. C. P. & Ev. 8th ed. 55; People v. Enoch, 13 Wend. 175; State v. Ripley, 2 Brevard, 382; State v. Tim, 3 Murph. 3; State v. Crans, 7 Gill & J. 290; Warner v. Com, 1 Barr, 154.

² Westwood's case, 2 Hale, 173.

³ Clanricarde (Earl) v. Stokes, 7 East, 520, and cases cited 1 Chit. C. L. 292, n.

⁴ R. v. Pim, R. & R. 425; though in Maryland, State v. Cassell, 2 H. & G. 470, and in N. Carolina, State v. Pool, 2 Dev. 202, the old rule is adhered to.

⁵ Dickinson's Q. S. 6th ed. 225.

⁶ State v. Drinkley, 3 Iredell, 117.

⁷ Rev. Stat. c. 35, s. 14, 15.

VI. c. 24, except that the English statute directs the trial to be in the county where the person died. It enacts that 'where any person shall be feloniously stricken in one county and die of the same stroke in another county, an indictment thereof, found by jurors of the county where the death shall happen, shall be as good and effectual in law as if the stroke had been given in the same county where the party shall die.' Mr. East says this statute created no new felony, but merely removed the difficulty which existed in the trial.¹ Indeed it is obvious that it provides only a mode of trial for a known existing offence, 'where any person shall be feloniously stricken,' and die thereof, without defining or enacting what shall be such felonious striking, or what the punishment, but leaving that to the law as it stood. The same observations apply to another statute connected with this subject, that of 28 Hen. VIII. c. 15, which provides for the case of both the stroke and death taking place at sea. The words are, 'that all murders, &c. committed in and upon the sea, &c., shall be inquired, tried, determined and judged, in such shires as shall be limited by the king's commissions, as if such offence had been committed upon the land.' So, likewise, of Stat. 2 G. II. c. 21, which embraces the case of the stroke in England, and the death without it, or *vice versa*, of which the language is 'that an indictment thereof, found by the jurors, &c., shall be good and effectual,' &c. In prosecutions authorized by those acts, the indictments, as it seems, have always concluded at common law.² It is true, offenders are thereby punished, who could not be punished before. But the reason why they were not punished before, was, solely, that no court had authority to try them. It was not because the crime did not exist, for the crime, murder, is the killing of any person in the peace of the state, with malice aforethought, and that is constituted alike by killing with the evil disposition, be the places of assault and death where they may. Language of precisely the same character is found in our act. It does not say that killing a person with malice, when the stroke is in one county, and the death in another county or in another state, shall be deemed murder, or that on conviction the person shall be deemed a felon, and suffer death without the benefit of clergy. It does not profess to define 'felonious homicide,' or to constitute that crime by any particular acts, but merely says, that in certain cases of felonious homicide, the offender may be indicted, and, of course, tried and punished in the country where the stroke was given; meaning, though it does not, like stat. 2 and 3 Ed. VI. expressly say so, 'in the same manner as if the death had happened in the same county where the stroke was given.' As the act of 28 Hen. VIII. c. 15, says, 'all murders committed on the sea shall be tried in a shire,' by commission of oyer and terminer; so our act says, 'in all cases of felonious homicide, &c., where, &c., the offender may be indicted,' &c. Besides, the character of our enactment may be further deduced from the circumstance that it is found in the Revised Statutes, in the 35th chapter on 'Criminal Proceedings,' and not in the preceding chapter on

¹ 1 East, C. L. 365.

² Arch. C. P. 22, 57, 58; Doug. C. C. 295; Cro. C. C. 278, 281; 3 Chit. C. L. 783.

‘Crimes and Punishments.’ It was, however, argued at the bar, that it was an essential part of the definition of murder, that the person slain should be in the peace of the state; and that where the death occurs in another state, that requisite is deficient in the crime at common law, and therefore, it cannot be an offence against this state, unless made so by the statute. And upon that ground a distinction was taken between the English statutes and ours, inasmuch, as it was said, the statutes both of Ed. VI. and of Hen. VIII. provide for cases of killing, in which the whole of the transaction occurred either in England, or within the jurisdiction of England, as exercised by her admiralty court. But we think the reasoning is not sound. That part of the definition of murder expressed in the terms, ‘on the king’s peace,’ refers not to the place of the assault and death, but to the state and condition of the person slain, as being or not being entitled to the protection of the English laws; for example, whether he be a subject or an alien enemy, or traitor in arms, or, in more ancient times, an infidel, or guilty of a *præmunire*. Then, it is also a mistake to say, that the acts are confined to cases in which every part of the transaction was within the jurisdiction of England, either as being within some of her territories, or on board of her ships. The act of Geo. II. before mentioned, provides for the case of one stricken in England and dying on the sea, or ‘at any place out of England,’ and we do not find that this has received a different construction from that of the previous statutes. We find an adjudication, however, upon another statute, which shows that the question does not depend on the ground supposed, but that the indictment is to conclude at common law, although *no part* of the transaction was within the British dominions or jurisdiction. By the stat. 33 Hen. VIII. c. 33, it is enacted, ‘that if any person, being examined before the king’s council upon any murder, do confess such offence, &c., then in such case a commission of oyer and terminer shall be made to such persons and into such shires and places as shall be appointed by the king for the speedy trial, conviction or delivery of such offenders, which commissioners shall have power and authority to inquire, hear and determine such murders within the shires and places limited by their commission, by such good and lawful men as shall be returned before them, in whatever other shire or place within the king’s dominion, or *without*, such offence of murder, so examined, was done or committed.’ In *Rex v. Sawyer*,¹ a British subject was indicted for the murder of another British subject, ‘at Lisbon, in the kingdom of Portugal, in parts beyond sea without England,’ and the indictment was at common law. The case was argued before the twelve judges, and they held that, being for a common law felony, committed abroad, but made triable in England under the 33 Hen. VIII., the indictment was right. That judgment is directly in point, and is decisive of this case against the prisoner. It must therefore be certified to the Superior Court, that there is no error in the judgment given by that court, in order that further proceedings may be had thereon according to law.”

¹ R. & R. C. C. 294.

XXI.—*Distinctive features of Manslaughter.*

Where the bill of indictment is found by the grand jury a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the English course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder;" and to leave only so much as makes the bill to be one for manslaughter;¹ and this appears to be the practice at the present time upon some of the circuits; but the usual course in this country is, unless the emergency of the case prevents it, to present a new bill to the grand jury for manslaughter. And in England a learned judge went so far as to say that this should be done where the grand jury have returned manslaughter upon a bill for murder, saying he thought it the better course to prefer a new bill, although the usual course on the circuit had been to alter the bill for murder, on the finding of the grand jury.²

Though the same indictment may charge one with murder and another with manslaughter, yet if it charged both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter.³

The indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and "murder;" and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion.⁴

If a person be indicted as accessory after the fact to a murder, he may be convicted as accessory after the fact to manslaughter, if the offence of the principal turns out to be manslaughter.⁵ Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessory after the fact.⁶

XXII.—*Pleas.*

The general characteristics of pleas in criminal prosecutions have been abundantly discussed in another treatise to which the reader is referred.⁷

In two points the pleading in cases of homicide is peculiar to itself, (1) where in England benefit of clergy is claimed after a conviction for manslaughter, and (2) where in this country on a retrial of a case in which there had on the first trial been no judgment, the defendant sets up the plea of "once in jeopardy."

In regard to the first of these cases one or two points may be observed, which, though of no positive authority among us, may have some analogical weight.

A man who has been convicted of manslaughter, and has had his clergy allowed, might have pleaded *autrefois convict* to an indictment, charging the same death upon him as a murder.⁸ And it is

¹ 2 Hale, 162. ² Turner's case, 1 Lew. 176. ³ 1 East, P. C. c. 5, s. 116, p. 347.

⁴ 1 Russ. on Cr. 584.

⁵ R. v. Greenacre, 8 C. & P. 35.

⁶ Ibid.

⁷ See Wharton's Cr. Law, b. 1, c. vii.

⁸ 1 Russ. on Cr. 565.

clear that *autrefois convict* of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder.¹ And *autrefois acquit*, or *autrefois attain*, upon an indictment for murder, has been held a good plea to an indictment charging the same death as petit treason.²

Where the prisoner had been tried for murder, and convicted of manslaughter, and had received the benefit of clergy, and was subsequently tried for murder, and convicted of manslaughter, in killing another individual (who died after the first trial) by the same act which caused the death of the first; the judges were unanimously of opinion, that the former allowance of clergy protected the prisoner against any punishment upon the second verdict; and that if the prisoner were to be called up for judgment, he might rely upon such allowance as a bar.³

The doctrine of "once in jeopardy" has been elsewhere very fully examined.⁴

Where after conviction of manslaughter, a new trial was granted on the prisoner's application, it was held in Tennessee that on the second trial, he was discharged from the charge of murder; but such has not been the usual understanding in practice. Of this a striking illustration is given in the address of Mr. Justice Grier, of the Supreme Court of the United States, to a party of prisoners who applied for a new trial after having been convicted of manslaughter in the Circuit Court of the U. S. in Philadelphia, in 1848. "But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and again to put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you."⁵

As a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction, it has been held that a party who has killed another in a foreign country, and been there prosecuted, tried, and acquitted, may avail himself of such acquittal in answer to any charge against him in this country for the same offence.⁶

¹ R. v. Wiggles, 4 Co. 45.

² 2 Hale, 246; Fost. 329.

³ R. v. Jennings, Russ. & Ry. 388. The act which occasioned the death of the two individuals, (two children,) we are told by Mr. Greaves, was one and the same. The general effect of the allowance of clergy, after the 8 Eliz. c. 4, was to discharge all offences precedent within clergy; but not such as were not entitled to the benefit of clergy. But by the 6 Geo. 4, c. 25, s. 4, the allowance of the benefit of clergy to any person who was convicted of any felony, did not render the person to whom such benefit was allowed, punishable for any other felony, by him or her committed, before the time of such allowance.

⁴ Wh. Cr. Law, b. 1, c. 7, s. 6.

⁵ 6 P. L. J. 22.

⁶ 1 Russ. on Crimes, 566; R. v. Hutchinson, 3 Kebl. 785, cited in *Beak v. Thyrrwhit*, 1 Show. 6; Bull. N. P. 245; 3 Mod. 194; 1 Leach, 135, note a. The defendant being apprehended in England, and committed to Newgate, was brought into K. B. by *habeas corpus*, where he produced an exemplification of the record of his acquittal in Portugal; but the king (Car. 2) being willing to have him tried for the same offence, referred the point to the consideration of the judges, who all agreed, that, as the party had been

XXIII. *Verdict.*

The uniform rule in the country, as will be seen more fully hereafter, is that under an indictment for murder in the first degree, the prisoner may be convicted of murder in the second degree.

The jury may, upon an indictment for murder, find the prisoner guilty of the offence charged, or of the lesser offences of manslaughter or excusable homicide;¹ or of an assault under the 1 Vict. c. 85, s. 11.² Where, however, the facts of the case amount only to excusable homicide, it is usual for the judge, at the present day, to permit or direct a general verdict of acquittal, unless some considerable blame appears to attach to the conduct of the party.³ And several persons present at a homicide may be guilty in different degrees, one of murder, the other only of manslaughter.

In Pennsylvania it is said that under a verdict of guilty of murder, sentence may be had for murder in the first degree.⁴ But in Alabama, in Ohio, and in Missouri, it is necessary on the conviction of a prisoner for that offence, that the verdict of the jury should ascertain the degree, otherwise, no judgment can be pronounced upon it.⁵

Whether a conviction may be had for assault and battery under an indictment for manslaughter, is in this country a matter of some doubt. In England the rule at common law was, that such a conviction could not be had, the reason being that if a misdemeanor be tried under an indictment for a felony, the defendant loses his right to a special jury and a copy of the bill of indictment.⁶ In this country, though the reason fails, the principle that under an indictment for a felony there can be no conviction for a misdemeanor is followed in Pennsylvania,⁷ in Massachusetts,⁸ and in Maryland.⁹ In New York,¹⁰ Vermont,¹¹ and Ohio,¹² it has been held that the English

already acquitted of the charge by the law of Portugal, he could not be tried for it again in England.

¹ 1 Hale, 449.

² 2 Hale, 302.

³ Co. Lit. 252.

⁴ Com. v. Earle, 1 Wh., 525.

⁵ Johnson v. State, 17 Ala. 618; State v. Town, Wright, 75; McGee v. State, 8 Miss. 495.

⁶ R. v. Gross, 1 Ld. Raym. 711; 3 Salk. 193; 2 Hawk. c. 47, s. 6; 1 Ch. C. L. 251, 639; R. v. Walter, 6 C. & P. 657.

⁷ Com. v. Gables, 7 S. & R. 433; Hackett v. Com. 3 Harris, 95, may seem to conflict with this, but it does not. There the word "feloniously" is mere impertinent surplusage in the bill.

⁸ Com. v. Newell, 7 Mass. 245.

⁹ Black v. State, 2 Maryl. 376.

¹⁰ People v. White, 22 Wend. 175; People v. Jackson, 3 Hill, 92; Lohman v. People, 1 Comstock, 379.

¹¹ State v. McCoy, 2 Aiken, 181; State v. Scott, 24 Vt. (1 Deane, 129.) The opinion of this court in this case was as follows: The respondent was indicted for manslaughter, and on trial was convicted under the charge of the court, of a common assault and battery. The jury have found by their verdict, that the death of Bailey was not occasioned by the assault, beating and wounding as alleged in the indictment, and the question is, can a conviction for an assault and battery be sustained on an indictment for manslaughter?

In England, the rule seems well settled, that where an indictment includes an offence of an inferior degree, the juror may discharge the defendant of the higher crime, and convict him of the lesser. As on an indictment for murder, he may be convicted of manslaughter; for robbery, of theft; for grand larceny, of petit larceny; and on an indictment founded on a statute, he may be convicted of an offence at common law. In all these cases, and others of a similar character, the inferior offence of which he is convicted is of the same character as the greater of which he is indicted, only it is inferior

¹² State v. Hess, 5 Ohio.

reasons ceasing, the rule itself ceases. In Massachusetts, the latter position is now established by statute.¹

in degree of guilt. The evidence introduced to prove the greater offence sustains the latter. The principal is favoured for the respondent, for which he has no reason to complain. It is equally well settled in England, that on an indictment for a felony at common law, a conviction cannot be had for a misdemeanor. The reasons assigned are, that the respondent loses the right of a special jury, benefit of counsel, and a copy of the indictment. And for this he has reason to object and complain, and courts adopting rules most favourable to the respondent will not allow such conviction.

But for these causes, we see no reason why at common law, such a conviction would not be sustained. These reasons do not manifestly exist in this state. Felony, as existing at common law, is not known under the laws of this state, as crimes do not work a forfeiture of the estate. But offences are distinguishable into what may be termed crimes and misdemeanors; the former punishable capitally or by confinement in the state prison, and the latter by fine and imprisonment in the county jail. On the trial of these cases there is no difference in the mode of trial, or the right of the respondent; and no reason exists in this state why one indicted for that which would be a felony at common law may not be convicted of a misdemeanor. The conviction would bar a subsequent prosecution, as well as a conviction for theft, under an indictment for burglary or robbery; indeed we must consider this subject as having been decided in this state in the two cases to which we have referred. In the case of the *State v. M'Lean*, 1 Aik. Rep. 313, the respondent was indicted for forgery, which was punishable by imprisonment in the state prison, but of which offence he was acquitted by the jury, and convicted of a misdemeanor, a cheat, an offence at common law, and fined. So in the case of *State v. Coy*, 2 Aik. Rep. 181, the respondent was indicted for an assault, with intent to murder, an offence punishable with imprisonment in the state prison; and on trial he was acquitted of that offence, but convicted of a common assault. Manslaughter is punishable by imprisonment in the state prison; it is followed by no greater punishment or legal consequences than forgery, or assault with intent to murder. And if a jury in those cases may acquit of a greater offence, and convict of the lesser, it would seem to follow as a necessary conclusion, that the same principle would apply to the other case. The result is that the judgment of the county court must be affirmed.

¹ *Com. v. Squires*, 1 Metc. 258.

CHAPTER XI.

HOMICIDE AS AFFECTED BY SLAVERY.

I. Homicide of slave by master or other white person.

II. Homicide of master or other white person by slave.

I. Homicide of slave by master or other white person.

The wilful and deliberate killing of a slave by a white person, no matter what may be his relation to the slave, is murder.¹ And in Virginia where the statutory distinction between murder in the first and murder in the second degree exists, the offence, if committed by cruel and unusual whipping, falls under the higher grade.²

"The prisoner," said Field, J., in a case where the subject was fully discussed, "was indicted and convicted of murder in the second degree, in the Circuit Court of Hanover, in its April term last past, and was sentenced to the penitentiary for five years, the period of time ascertained by the jury. The murder consisted in the killing of a negro slave by the name of Sam, the property of the prisoner, by cruel and excessive whipping and torture, inflicted by Souther, aided by two of his other slaves, on the first day of September 1849. The prisoner moved for a new trial, upon the ground that the offence, if any, amounted only to manslaughter. The motion for a new trial was overruled, and a bill of exceptions taken to the opinion of the Court, setting forth the facts proved, or as many of them as were deemed material for the consideration of the application for a new trial. The bill of exceptions states: "That the slave Sam, in the indictment mentioned, was the slave and property of the prisoner. That for the purpose of chastising the slave for the offence of getting drunk, and dealing as the slave confessed and alleged, with Henry and Stone, two of the witnesses for the Commonwealth, he caused him to be tried and punished in the presence of the said witnesses, with the exception of slight whipping with peach or apple tree switches, before the said witnesses' arrival, after they were sent for by the prisoner, (who were present by request from defendant,) and of several slaves of the prisoner, in the manner and by the means charged in the indictment; and the said slave died under and from the inflictions of the said punishment, in the presence of the prisoner, one of his slaves, and one of the witnesses for the commonwealth. But it did not appear that it was the design of the prisoner to kill the said slave, unless

¹ *State v. Scott*, 1 Hawks, 24; *State v. Hale*, 2 Hawks' Rep. 582; *State v. Jones*, Walker, 83; *Souther v. Com.*, 7 Gratt. 673; *Worley v. State*, 11 Humphr. 172, 176; though see *State v. Fleming*, 2 Stroth. 464; *Neal v. Farmer*, 9 Georg. 555, where it is held, that the common law does not apply to the institution of slavery, so far as concerns homicide of the slave.

² *Souther v. Com.*, 7 Gratt. 673.

such design be properly inferable from the manner, means, and duration of the punishment. And on the contrary, it did appear that the prisoner frequently declared, while the said slave was undergoing the punishment, that he believed the said slave was feigning and pretending to be suffering and injured, when he was not. The judge certifies that the slave was punished in the manner and by the means charged in the indictment. The indictment contained fifteen counts, and set forth a case of the most cruel and excessive whipping and torture. The negro was tied to a tree and whipped with switches. When Souther became fatigued with the labour of whipping, he called upon a negro man of his, and made him cob Sam with a shingle. He also made a negro woman of his help to cob him. And after cobbing and whipping he applied fire to the body of the slave; about his back, belly, and private parts. He then caused him to be washed down with hot water in which pods of red pepper had been steeped. The negro was also tied to a log and to the bed post with ropes, which choked him, and he was kicked and stamped by Souther. This sort of punishment was continued and repeated until the negro died under the infliction. It is believed that the records of criminal jurisprudence do not contain a case of more atrocious and wicked cruelty, than was presented upon the trial of Souther; and yet it has been gravely and earnestly contended here by his counsel, that his offence amounts to manslaughter only. It has been contended by the counsel of the prisoner, that a man cannot be indicted and prosecuted, for the cruel and excessive whipping of his own slave. That it is lawful for the master to chastise his slave, and that if death ensues from such chastisement, unless it was intended to produce death, it is like the case of homicide, which is committed by a man in the performance of a lawful act, which is manslaughter only. It has been decided by this court, in *Turner's case*,¹ that the owner of a slave, for the malicious, cruel, and excessive beating of his own slave, cannot be indicted; yet it by no means follows when such malicious, cruel, and excessive beating results in death, though not intended and premeditated, that the beating is to be regarded as a lawful act, for the purpose of reducing the crime to manslaughter, when the whipping is inflicted for the sole purpose of chastisement. It is the policy of the law in respect to the relation of master and slave, and for the sake of securing proper subordination and obedience on the part of the slave, to protect the master from prosecution in all such cases, even if the whipping and punishment be malicious, cruel, and excessive. But in so inflicting punishment, for the sake of punishment, the owner of the slave acts at his peril; and if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation. The principles of the common law in relation to homicide, apply to this case, without qualification or exception, and according to those principles the act of the prisoner, in the case under consideration, amounted to murder. Upon this point we are unanimous. But what was the law in respect to felonious homicide on the 1st day of September 1849, when the offence was committed. It is to be found in the sessions acts of 1847, 1848, p. 95. By that act it is

¹ 5 Rani.

declared, "that unlawful homicide shall be murder of the first degree, murder of the second degree or manslaughter." Murder committed by poison, lying in wait, duress of imprisonment; starving, wilful and excessive whipping, cruel treatment or any kind (not any other kind, as the law heretofore was,) of wilful, deliberate and premeditated killing, or in the attempt to commit any arson, rape, robbery or burglary, shall be murder in the first degree, and all other murder shall be murder in the second degree. "Murder in the first degree shall be punished with death." The judge certifies in his bill of exceptions as a fact proved in the excuse, that "the slave died under and from infliction of the said punishment." Apply the words of the act of assembly to this case, and it clearly appears that the crime of the prisoner is not manslaughter, but murder in the first degree.¹

If death ensue from a master's chastisement of his slave, inflicted apparently with a good intent for reformation, or example, and with no purpose to take life or to put it in jeopardy, the law would doubtless tenderly regard every circumstance, which, judging from the conduct generally of masters towards slaves, might reasonably be supposed to have led the party into excess. But where the punishment is barbarously immoderate and unreasonable in the measure, the continuance and the instruments, accompanied by other hard usage, and painful privations of food, clothing and rest, it loses all character of correction, in *foro domestico*, and denotes plainly that the master must have contemplated a fatal termination to his barbarous cruelties; and in such case, if death ensue, he is guilty of murder.²

The term manslaughter has in South Carolina, under the Act of 1821, a restricted sense, and is confined to killing in "sudden heat and passion,"³ and includes any killing of a slave by undue or excessive correction.⁴

There is this distinction to be observed between the rule of provocation obtaining in reference to slaves, and that obtaining in reference to freemen. As will presently be seen, abusive words or threats form not sufficient provocation to lower to manslaughter the grade of homicide committed under their sting. On the other hand, when the relations of the parties are reversed, the rule is changed, and abusive language from the slave to the freeman, are considered so far capable of disturbing the balance of the latter's temper, as to make a homicide committed by the latter on the former, in the gust of sudden passion, but manslaughter.⁵

It is competent for one charged with the murder of a slave, to show that he was turbulent, and insolent and impudent to white men.⁶

II. *Homicide of master or other free person, by slave.*

The great distinction between homicide committed with malice, and that committed in a transport of passion suddenly excited by a grievous provocation, is as steadily to be kept in view, in the trial of a slave charged with the murder of a white man, as in that of a white charged with the murder of his equal, or of a slave. But the same

¹ *Souther v. Com.*, 7 Gratt. 673.

² *State v. Hoover*, 4 Dev. & Bat. 365; *Kelly v. State*, 3 Smedes & Mars. 518.

³ *State v. Fleming*, 2 Stroth. 464.

⁴ *Ibid.*

⁵ *Tackett's case*, 1 Hawks, 217.

⁶ *State v. Tackett*, 1 Hawks, 210.

matters which would be deemed in law a sufficient provocation to free a white man, who has committed a homicide in a moment of passion, from the guilt of murder, will not have the same effect when the party slain is a white man, and the offender a slave; for though among equals, the general rule is, that words are not, but blows are, a sufficient provocation, yet there may be words of reproach so aggravating when uttered by a slave, as to excite in a white man the temporary fury which negatives the charge of malice; and this rule holds without regard to the personal merit or demerit of the white man.¹

Recently in Tennessee this question has been fully examined in the Supreme Court. The evidence was, (we quote from the opinion of the court,) "That on the night of the 11th of November, 1845, the prisoner and a number of other negroes were at a corn husking, at the house of John Nesbit, having been invited to assist in husking and putting up the corn and husks. After the husking was over, and while the hands were employed in putting away the husks, a quarrel arose between some of the negroes, of whom Nelson was one. The deceased (who was the son-in-law of Nesbit, and had been requested by Nesbit to superintend the putting away of the husks,) procured a stick and struck one of the negroes. Nelson thereupon spoke in an abrupt manner to Sellars, who then struck Nelson two or three blows with a stick or club. It was a hickory stick as large as a stair post. Some of the negroes, and Nelson among them, then went off, twenty or thirty yards in the direction of their home. They were called back to get their supper, by Ellis Nesbit, the son of the owner of the corn. When they went back to the place where the corn had been husked, Sellars, the deceased, spoke to Nelson, who was in front, saying, "You have come back again have you?" To which Nelson replied, "Yes, and if you will give me a white man's chance, I will whip you like damnation." The deceased then struck Nelson several times with a stick, knocking him down on his knees; and as Nelson recovered the deceased struck him with the stick again, and Nelson pressing up toward the deceased, stabbed him with a long knife, which had been made by grinding a file to an edge or point. The deceased cried out, "I am stabbed;" and Nelson was pulled away, and ran off. The deceased lived but a short time after the stab was given. He was an athletic man, weighing 160 or 170 pounds, and had been an overseer for Mr. Elliott, but was not his overseer at the time of the stabbing. When Nelson and others started towards home, they were not gone more than a minute or two before they were back again. Joe, a slave, witness for the defendant, proved that Nelson is a basket maker, and had the knife, with which the stabbing was done, to work in white oak, and that he usually carried it about him. Nelson had one or two bad cuts on his head, made by the blows inflicted by the deceased, and the blood was running down his face. This is all the material testimony. The court charged the jury, that the distinction made by the statute between murder in the first, and murder in the second degree, did not apply to the defendant; that if the proof satisfied the jury that the defendant was guilty of

¹ *State v. Jarrett*, 1 Iredell, 76; *Jacob v. State*, 2 Hawk. 493. See ante, p. 169, 170, 190, 191, &c.

murder as defined by the common law, it would require them to find him guilty as charged in the bill of indictment; that malice was the distinguishing character between murder and manslaughter, so far as the defendant was concerned, that murder in a slave, according to the common law definition, was a capital offence; and that the court knew of no punishment authorized by law that the court could inflict for the offence of manslaughter in a slave. The court further charged the jury, "that a white man was authorized by law to correct the slave of another, in a reasonable manner, for insolence, with a view of stopping the insolence; but when the insolence ceased the correction should cease. That a slave may resist a stranger who attacks him in a manner to endanger his life or limb, or to do him some great bodily harm; that to make a slave excusable for killing a white man who has no right of control over him, but who attacks him in a manner dangerous to life or limb, or calculated to do him some great bodily harm, he must retreat as far as he can, unless the attack is so fierce that it would be more dangerous to retreat than to resist. The court charged the jury, "That the great distinction between homicide committed with malice, and that committed in a transport of passion suddenly excited by a grievous provocation, is as steadily to be kept in view in the trial of a slave charged with the murder of a white man, as in that of a white man charged with the murder of his equal, or of a slave. But the same matters which would be deemed in law a provocation to a free white man who has committed homicide in a moment of passion, from the guilt of murder, will not have the same effect when the party slain is a white man and the offender a slave. For though among equals the general rule is, that words are not, but blows are a sufficient provocation; yet there may be words of reproach so aggravating when uttered by a slave, as to excite in a white man the temporary fury which negatives the charge of malice. The court also charged the jury, "That so far as the offence of murder was concerned the defendant was entitled in all respects to be treated as if he were a white man." Upon this evidence, and charge of the court, the jury returned the following verdict: We find Nelson, a slave, guilty of murder in the second degree, and submit him to the mercy of the court. The defendant moved for a new trial, and offered the affidavit of William Horner, A. J. Taylor, Thomas Fortner, Caswell Cotham, and Richard Sucker, five of the jurors before whom the prisoner was tried, who state, "That they agreed to render the verdict of murder in the second degree, with a recommendation to the mercy of the court, upon the ground only that they believed, from the argument of their fellow jurors and the charge of the court, that the court had the power to commute the punishment from hanging to any less punishment. They state that when they agreed first to offer the verdict above spoken of, in conjunction with their fellow jurors, and the court refused to receive the same, they supposed that the court had refused to accept the verdict and exercise any power to commute the punishment. But when they were sent for the last time they then supposed that the court had come to the determination to receive the verdict and commute the punishment according to their former views; and it was in this view of the case, and this only, that they would ever have been induced to join in the verdict rendered

in this case. They further state that all the jurors generally seemed to be of opinion that the court, by sending for them, had agreed to accept their verdict with the understanding stated above. While the argument for the new trial was pending, the prisoner offered the affidavit of A. J. Taylor, one of the jurors, who states, "that at the rendition of the verdict he did not believe that the defendant was guilty of murder, or any higher offence than manslaughter, and only agreed to said verdict for the causes stated in the former affidavit." The court overruled the motion for a new trial, and pronounced sentence of death upon the prisoner; from which judgment the prisoner appealed to this court. Several questions of considerable importance are raised by this record. And first, has a stranger a right to chastise the slave of another person? In South Carolina it is held that the criminal offence of assault and battery cannot be committed on a slave.¹ The slave is not regarded as being within the peace of the state; and therefore the peace of the state is not broken by an assault and battery on him. He can look alone to his master for protection, who may maintain trespass for a battery on his slave. But, in North Carolina, a different doctrine prevails, and one much more consonant to our feelings of humanity, and much calculated to preserve the peace and good order of society. It is therefore held, that the principles of the common law, where there is no legislation on the subject, moulded and suited to our social condition, must be held to apply to offences committed upon a slave. In the case of *State v. Hale*,² Chief Justice Taylor says: "It would be a subject of regret to every thinking person, if courts of justice were restrained by any austere rules of judicature from keeping pace with the march of benignant policy and provident humanity, which for many years has characterized every legislative act relative to the protection of slaves, and which Christianity, by the mild diffusion of its light and influence, has contributed to promote." And again he says, "When the authority of the master is usurped by a stranger, nature is disposed to assert her rights, and prompt the slave to resistance. The public peace is thus as much broken, as if a free man had been beaten. A wanton injury committed on a slave, is a great provocation to the owner, awakens his resentment, and has a direct tendency to a breach of the peace, by inciting him to seek immediate vengeance; and if resented in the heat of blood, it would probably extenuate a homicide to manslaughter. These offences are usually committed by men of dissolute habits, hanging loose upon society, who being repelled from association with well disposed citizens, take refuge in the company of coloured persons and slaves, whom they deprave by their example, embolden by their familiarity, and then beat, under the expectation that a slave dare not resent a blow from a white man." In view of these considerations, the court rule, that an assault and battery upon a slave by a stranger is indictable. But in view of the actual condition of society, and the difference that exists between the two races, many circumstances that would not constitute a legal provocation for a battery by one white man upon

¹ *State v. Minor*, 2 Hill's R. 453; *State v. Chentwood*, 2 Hill's R. 459; *Hilton v. Carton*, 2 Bailey's R. 98; *White v. Chambers*, 2 Bay's R. 70.

² 2 Hawks' Ren. 582.

another, would justify it if committed on a slave, provided the battery were not excessive. We fully concur with this view of the subject taken by the Supreme Court of North Carolina. We think it alike necessary to secure the rights of the master, to protect the slave from wanton abuse, and to save white men from injury and insult.

2. "The next question is, may homicide committed by a slave on a free white man, not excusable in self-defence, be reduced below the grade of murder? Upon this subject the charge of his honour, the circuit judge, is vague and indistinct. It is true, that in one part of the instruction it is said, 'That the great distinction between homicide committed with malice, and that committed in a transport of passion, excited by a grievous provocation, is as steadily to be kept in view in the trial of a slave charged with the murder of a white man, as in that of a white man charged with the murder of his equal.' And again, in conclusion, he says, 'that so far as murder is concerned, the defendant is to be treated as if he were a white man.' These passages of instruction to the jury, taken alone, indicate pretty clearly that the judge was of opinion that manslaughter might be committed by a slave. But in another part of the instruction, he says: 'The court knows of no punishment authorized by law, that he could inflict for the offence of manslaughter in a slave.' Again, he says: 'That a white man is by law authorized to correct the slave of another, in a reasonable manner, for insolence; that a slave may resist a stranger who attacks him in a manner to endanger his life or limb, or to do him some great bodily harm: that to make a slave excusable in killing a white man, who has no right or control over him, but who attacks him in a manner dangerous to life or limb, or calculated to do him some great bodily harm, he must retreat as far as he can, unless the attack is so fierce that it would be more dangerous to retreat than to resist.' The sense of these latter passages seems applicable alone to a case of excusable self-defence. The judge says in substance, that a white man may correct the slave of another for insolence; but if the attack on the slave endanger his life or limb, or put him in danger of great bodily harm, and he cannot retreat, he is excusable if he slay his assailant; but that the court knows of no punishment for manslaughter committed by a slave. The case put by his honour, would clearly be a case of self-defence, and, as stated by him, the slave would be excusable; and he excludes the consideration of a case of manslaughter altogether, not only by failing to put a possible case in which it may be committed, but by expressly stating that there was no punishment provided by law for that offence; thus leaving it to be inferred by the jury, that the offence did not exist.

"The question then is, did his honour err in this view of the subject? And it may be observed here, that the question is not whether the owner of a slave may be guilty of assault and battery, by the immoderately beating his slave; or, whether if a slave slay his master while he is enduring a cruel and inhuman chastisement, such killing could be mitigated to manslaughter. We are aware that the Supreme Court of North Carolina, in the case of the State *v.* Mann,¹ held that the master is not liable to an indictment for a battery committed on

his slave, no matter how cruel and excessive such battery may be. And Judge Turley, in the case of the *State v. Jacobs*,¹ says: 'The right to obedience and submission in all lawful things on the part of the slave, is perfect in the master; and the power to inflict any punishment not affecting life or limb, which he may consider necessary for the purpose of keeping him in such submission, and in enforcing such obedience to his commands, is secured to him by law; and if in the exercise of it, with or without cause, the slave resist and slay him, it is murder and not manslaughter; because the law cannot recognise the violence of the master as a cause of provocation.' But Green, J., in same case says: 'I think proper to announce distinctly as my opinion, that there may exist cases in which the killing of a master by a slave would be manslaughter. What circumstances of torture, short of endangering life or limb, would so reduce a homicide it is not easy to indicate. Every such case must rest upon its peculiar facts. The rights and duties of the parties must form the criteria by which an enlightened court and jury should act.' Judge Reese expressed no opinion upon this point, nor was there anything in the case to call for the dicta above referred to. The whole court concurred in opinion, that there was no mitigating circumstance in the case, and it was most clearly a case of murder. But the case now before the court is of a different character altogether. The man who was killed was neither the master nor overseer of the slave. He received the wound while he was inflicting severe blows with a heavy cudgel upon the prisoner's head. It becomes necessary, therefore, that we determine whether in such a case, manslaughter may be committed. In *Jacobs'* case, before referred to, it is asserted, that the principles of the common law are applicable to the relations that exist between the slave and his master; and with much more reason may we assert that those principles are applicable, when the slave inflicts an injury on a white man, who is a stranger. The statute² declares, that murder, when committed by a slave, shall be punished with death. Now, what murder is, we learn from the definition of the common law. It is 'where a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, with malice aforethought.' And unless it be so done, he is not guilty of murder. But, the killing being established, the law presumes that it was done maliciously, and circumstances of alleviation or excuse must be shown by the accused. In general, if a party that is struck strikes again, and death ensues, it is only manslaughter. The law regards the blow as a sufficient provocation to excite the passions, so that the party act under the influence of the sudden heat, and not from malice. But a slight assault will not always extenuate the killing to manslaughter; much depends upon the character of the weapon used, in reference to the provocation. There must be a reasonable proportion between the mode of resentment and the provocation to reduce the offence of killing to manslaughter.³ So if there be proof of malice at the time of killing, the existence of provocation will not reduce it to manslaughter. For although the provocation usually repels the presumption of malice, yet if its actual existence be established, notwithstanding the provo-

¹ 3 Humph. 920.² 1819, c. 35, s. 1.³ Archb. Crim. L. 392.

cation, it is murder, and not manslaughter.¹ How then shall these principles be applied to the case of a slave who kills a white man? The common law is in the breast of the judges, and must be expounded under the influence of enlightened reason. Thus guided, it is manifest that the same indignity which would excite the passions of a white man, would not have a like effect upon a slave. That which would be grievous provocation to the one, would provoke the other but slightly. This difference arises from the different habits of feeling, and modes of thought of the two races. In view of reason, then, the common law cannot hold, that an act constituting a provocation which would mitigate a homicide committed by a white man, to manslaughter, shall have a like effect when the homicide is committed on a white man by a slave. So to hold, would be a perversion of the principles of the common law by sticking to its letter. It would be to disregard entirely the character and condition of this portion of our population, and would be as repugnant to reason, as it would be mischievous to practice. It does not, however, follow, that a provocation may not be so grievous, as that, if the slave slay the white man, it will be but manslaughter, although the life or limb of the party killing is not endangered. On the contrary, we think there is no doubt but that cases may exist where the slave committing the homicide, although not excusable as having acted in self-defence, yet he cannot be deemed to have done the act with malice aforethought. In the case of the *State v. Will*,² Judge Gaston, delivering the opinion of the court, held the killing to be manslaughter only. In that case, too, the person killed was the overseer, and had authority to punish the prisoner. The deceased had attempted to punish the prisoner, who ran off, refusing to submit. The deceased got a gun, loaded with shot, and firing on the prisoner, inflicted wounds on his back. He then pursued and overtook the prisoner, and a scuffle ensued, and the prisoner inflicted the fatal stab on the arm of the deceased with a knife, the overseer then being unarmed. Here, the prisoner was not acting in self-defence, but in the heat of blood, occasioned by the smarting wounds, the act was done, and the court held it was not done with malice. The court cannot point out with precise accuracy, what particular extent of provocation will reduce such homicide to manslaughter. Each case must depend very much on its own circumstances, and must be left to the enlightened judgment of the jury. If the slave has misbehaved, and by his insolence provoked merited chastisement, and punishment be reasonably inflicted upon him, it is his duty to submit; and if he resist and slay the person chastising him, it will be murder. But if the punishment be unreasonable and excessive, the killing will only be manslaughter. If a slave, not having misbehaved or given cause for offence, is assaulted and beaten by a stranger who has no authority over him, such killing will be extenuated to manslaughter, in cases where such extenuation would not exist, if by insolence and misconduct, the slave had provoked chastisement. Having thus stated our opinion, that by our law, manslaughter may be perpetrated by a slave, it follows that if

¹ 1 Russ. on Crimes, 440; Roscoe's Crim. Ev. 627.

² 1 Dev. & Bat. Rep. 121.

the charge of the court to the jury excluded the investigation of the question of manslaughter, in this case his honour erred. And it was so excluded, we think has been made apparent, by the review of the charge we have presented in the former part of this opinion. The court also misled the jury when he told them, in effect, that there was no law in this state by which manslaughter could be punished. It is true, the indictment of a slave for murder does not include a charge of manslaughter; and because, by the act of 1819, ch. 35, sec. 1, murder committed by a slave is declared to be capital; and by the act of 1835, ch. 19, sec. 9, exclusive original jurisdiction is given to the Circuit Courts, of all offences committed by slaves which are punishable with death; and as manslaughter is not so punishable, the Circuit Court has no jurisdiction thereof, and therefore it cannot be included in the indictment filed in that court. But if it exists as an offence, it is punishable. By the act of 1741, ch. 24, sec. 48,¹ any crime committed by a slave, was to be tried before three justices, and four freeholders and slaveholders, and punished at their discretion. By the act of 1783, ch. 14, sec. 2,² trivial offences were to be tried before one justice alone, and punished, not exceeding forty lashes. But if the justice was of opinion that the offender deserved a greater punishment, he was to commit him to jail to be tried, as theretofore. By the act of 1815, ch. 138, sec. 1,³ the 48th section of the act of 1741 is repealed, and it is provided, that offences committed by slaves shall be tried before three justices and nine freeholders and slaveholders, and if found guilty, they shall pass such judgment, according to their discretion, as the nature of the crime or offence shall require. By the act of 1819, ch. 35, sec. 1, murder, arson, burglary, rape and robbery are declared capital, to be punished with death; and all other offences are to be punished as heretofore; provided that the punishment in no case shall extend to life or limb, except in case above enumerated. It will be seen from this review of the statutes, that all offences committed by slaves, the punishment of which is not specially provided for by statute, may be punished at the discretion of the court and jury, provided such punishment extend not to life or limb. The act of 1815, ch. 138, is not in the compilation of Nicholson and Caruthers, and the act of 1783, ch. 14, is entirely misconceived by them, and we suppose his honour was misled by that work. The jury were led to the inevitable conclusion, by the charge of the court, that unless the prisoner was convicted of murder, he would be excused altogether from any punishment, and thus, doubtless, were influenced by his misdirection to render the verdict returned by them. 3. The verdict of the jury is wholly inapplicable to the case before them. They say, they 'find Nelson, a slave, guilty of murder in the second degree, and submit him to the mercy of the court.' There is no second degree of murder as to slaves, and perhaps if the case depended alone upon the form of this verdict, the court might pronounce judgment upon it, regarding as surplusage, the words 'second degree.' But when we remember that the law of murder as to white men is divided into the first and second degree; the first punishable with death, and the second not so

¹ 1 Scott Rev. 74, 75.² 1 Scott Rev. 279.³ 2 Scott Rev. 246, 247.

punishable; and that this law is expounded and acted on every day in our courts, and is familiar to the minds of men generally, we cannot fail to perceive that the jury were labouring under erroneous impressions as to the law of the case then before them. They unquestionably supposed, that under their finding, a punishment short of death would be inflicted. And this inference, from the form of the verdict alone, is rendered still more certain by the affidavit of five of the jurors. They say, that from the arguments of their fellow-jurors, they were induced to believe that if they found such a verdict, the court could adjudge a punishment short of death; and that if they had not believed, they never would have consented to a verdict of guilty. They say, when they came into court with their verdict, the court refused to receive it, and sent them back, but soon after, sent for them again, and did receive the verdict; thereby confirming their first impression, that the court would not pronounce sentence of death upon the prisoner. We think this is a stronger case than that of *Crawford*, in 2 Yerg. Rep. The affidavit of the jurors, when taken alone, constitutes it very analogous to *Crawford's* case. But when we connect with their affidavit the form of the verdict by which the facts they state are rendered certainly true, all the dangers which would otherwise exist in receiving the affidavits of jurors to impeach their verdict, is obviated. We do not think that a verdict ought to stand, when the life of a human being is involved, which has been rendered under the influence of such misconceptions of the legal effect of it; especially where those misconceptions have been produced and fortified by the action of the court.

"In the first place, the charge of the court left the jury under the impression that unless the prisoner were punished for murder, he could not be punished at all; and they, acting under that mistaken opinion, resorted to this form of a verdict to effect what they were led to suppose was the judgment of the law, and at the same time, to save the life of the prisoner. Besides, it is seriously doubted by some members of the court, whether the verdict is an answer to the indictment. The indictment is for a charge of murder simply. It includes no different grades of crime. The verdict could only be 'guilty' or 'not guilty.' But this verdict has manifest reference to an entirely different character of indictment; one which includes three grades of felonious homicide. The jury had in their minds, therefore, an indictment wholly different from that actually before them, and intended their verdict as an answer to that, and not to the case now before us. 4. Upon the facts of the case we forbear any commentary. If Nelson, after leaving and starting towards home, conceived the design to inflict injury on the deceased, in revenge for the blows he had received, and returned armed, and intending, by insolence, to provoke blows again, and then to stab, it would be an aggravated case of murder. But if, without any such purpose, he returned, because he had been invited to come back to supper, and his insolent reply was prompted on a sudden by the address of the deceased, and the previous infliction of blows, then it will be for the jury to determine whether the blows inflicted on him exceeded a proper chastisement for his insolence. If they did not, it would still be a case of murder. But if the blows were inflicted with a weapon, and

in a manner cruel and excessive, in view of the prisoner's insolence, the killing would be only manslaughter, and of this the jury must judge."¹

At common law, if a master administer moderate correction to his apprentice, and the apprentice slay the master thereupon, the offence is murder. So, if a slave kill his master, whilst the latter is correcting him, it is murder at common law; and those present aiding and abetting are guilty of the same offence. They would even be guilty as principals in the first degree, although the actual perpetrator himself were guilty of no crime, if they made use of him as the instrument to effect their own deliberate purpose of destroying the deceased.²

"This is a case," said the Supreme Court of Tennessee, in discussing a question falling under this head, "which has been productive of much feeling and solicitude, and has excited that deep attention and consideration with the public, the bar, and the court, which its magnitude, involving, as it does, some of the most vital principles of our social relation, has well merited. It has been thoroughly investigated and ably argued, both on the part of the state and prisoner, and the opinion to which the court has arrived, has been the result of its maturest examination and deliberation; prompted, on the one hand, by a deep anxiety to preserve the peace and harmony of society, and on the other, by the fixed determination, resulting from a high sense of duty, to extend to the unfortunate individual under trial, the fullest protection which the law of the state guaranties to him. He is a slave. Slavery exists in Tennessee, having been handed down to us from generation to generation for centuries. It is secured, protected, and regulated by law. With the abstract justice of the institution we have nothing to do; our duties being confined exclusively to declaring the law, upon questions of controversy arising out of the relation it creates. In the case now under consideration, the slave has deprived his master of his life, and it is for us to pronounce what atonement the law, under the circumstances, demands at his hands. It appears from the proof, that the prisoner struck the fatal blow with a butcher-knife, while his master was in the act of attempting to chastise him for disobedience of orders, neglect of duty, and saucy, impertinent language. The case shows great forbearance on the part of the master, an entire absence of any inhumanity or cruelty, and nothing but a determined design to inflict such punishment, in proper moderation, as the offence merited, and as was necessary for the due subordination, regulation, and control of his slave. The blow was struck with a deadly weapon, with a fixed and deadly design, without justification, excuse, or mitigation, unless the mitigation is to be found in the assault and battery inflicted upon his person, in the attempted chastisement. It has been argued that it is; that the statute of 1819, ch. 35, which makes murder, when committed by a slave, a capital offence, does not define the offence; that its definition is to be sought in the common law of Great Britain; that there being no slavery in that country, the relation of master and slave has no existence; that, therefore, there is no dis-

¹ *Nelson v. State*, 10 Humph. 519, &c.

² *State v. Crank*, 2 Bail. 66.

inction taken between a homicide committed by a slave and a free person, and of consequence, that inasmuch as a blow stricken, will, in the case of a free person, mitigate the offence to manslaughter, the same result must follow in the case of a slave. This is the whole argument, and upon it the case rests. The common law has been aptly called the *lex non scripta*, because it is a rule prescribed by the common consent and agreement of the community, as one applicable to its different relations, and capable of preserving the peace, good order, and harmony of society, and rendering unto every one that which of right belongs to him. Its sources are to be found in the usages, habits, manners and customs of a people; its seat, in the breast of the judges who are its expositors and expounders. Every nation must of necessity have its common law, let it be called by what name it may; and it will be simple or complicated in its details, as society is simple or complicated in its relations. A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce, and arts, and agriculture, enriched a nation. A common law of a country will, therefore, never be entirely stationary, but will be modified and extended by analogy, construction, and custom, so as to embrace new relations, springing up from time to time from an amelioration or change of society. The present common law of England is as dissimilar from that of Edward III. as is the present state of society. And we apprehend that no one could be found to contend that hundreds of principles, which have in modern times been examined, argued and determined by the judges, are not principles of the common law, because not found in the books of that period. They are held to be great and immutable principles, which have slumbered in their repositories because the occasion which called for their exposition had not arisen. The common law, then, is not like the statute law, fixed and immutable, by positive enactment, except where a principle has been adjudged as the rule of action. If, then, one generation be not hedged in by the principles of the common law, established by another, as to be prohibited from extending them, by analogy and construction, to new relations and modifications of society, by what principle shall a sovereign state which has adopted the common law of another as one of its rules of action be so prohibited? It will be perceived that we are approaching the examination of the question presented for consideration in this case, upon the assumed ground that there is no adjudged principle of the common law of England regulating the relation of master and slave, (for we lay out of view the old and exploded relation of master and villein, not feeling it necessary to base our argument upon it,) and that there is nothing limiting expressly the slave's right of resistance to his master, beyond what one free man is limited in his resistance of another. And we ask, if this be so, as the common law is at present, and was expounded in England at the time we adopted it, if it of necessity follows that, with a creation of the new relation of master and slave, it may not be so extended by analogy and construction to embrace it, and give security and protection to all rights arising under it, as well of life as property, of master and slave? The argument extended would

deprive the master of the right of property in his slave. Our system of slavery in its inception is not based upon positive enactment, but upon the common consent of the community to hold Africans as property. It is true its existence has been since recognised by various acts of parliament in relation to the colonies, by various acts of the legislatures of North Carolina and Tennessee, and by our amended constitution; but still, when we come to inquire what kind of property a man has in his slaves, what are the remedies provided to secure him in its enjoyment, we are forced to the common law for information. From it we learn that it is personal property, that it passes by alienation, descends and is distributed like other personal property, that the same actions are provided for redress of injuries affecting it, an action of trespass or case for wrongs done it, and trover, or detinue for its conversion or detention. But on what principle do we call it personal property, or bring these actions? By analogy. It is of the nature of personal property as described by the common law, and as such these are the proper actions for molestation in its enjoyment. Such then is the common law, that though principles once established by judicial determination can only be changed by legislative enactment, yet such is its malleability—if we may use the expression—that new principles may be developed, and old ones extended by analogy, so as to embrace newly created relations and changes produced by time and circumstances. Such it is in Great Britain at the present moment—such it was when we adopted it, and such it now is with us. Let us then proceed with these views in hand, to examine what the common law is in relation to the offence with which the prisoner stands charged and convicted. Homicide is declared to be either justifiable, excusable or felonious; it is not in the present case pretended to be either justifiable or excusable; it is therefore felonious, and either murder or manslaughter. Murder is “where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, with malice aforethought express or implied.”¹ Manslaughter is “the unlawful and felonious killing of another, without any malice express or implied;” as where upon a sudden quarrel two persons fight, and one of them kills the other—or where a man greatly provokes another by some personal violence, and the other immediately kills him. An assault is in general such provocation, as that if the party struck, strikes again, and death ensues, it is only manslaughter; yet it is not every trivial assault which will furnish such a justification; for if a man kills another suddenly, without any, or without any considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only.² In considering, however, whether the killing upon provocation amount to murder or manslaughter, the instrument with which the homicide was effected must also be taken into consideration, for if it were effected with a deadly weapon, the provocation must be great indeed, to extenuate the offence to manslaughter; if with a weapon, or other means not likely or intended to produce death, a less degree of provocation will be

¹ 3d Inst. 47.

² Kel. 135; 1 Hale, 466; Fost. 290.

sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter.¹ Again, as evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such cases, not even previous blows or struggling will reduce the offence to manslaughter.² In the case of the *King v. Thomas*,³ Lord Tenterden observes: 'It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; that if there had been any evidence of an old grudge between them, the crime would probably be murder.' So tender is the law of human blood, that it watches with a jealous eye, whilst it is making provisions for the weakness and imperfections common to our nature, lest advantage be taken of its mercy, and vengeance be perpetrated under the garb of frailty. The present case was one of no sudden outbreak; the controversy had been pending for several days; a previous attempt had been made to chastise the prisoner, by the deceased, which was resisted and resented; information had been given on several occasions that the punishment would be inflicted, and inquiry made if he were willing and ready to receive it; but he obstinately stood out against it; he did more, he prepared himself in the interim, coolly and deliberately with a deadly weapon with which to resist, and resist unto death, if it became necessary to protect himself from personal chastisement. He did resist, and with a remorseless disregard of consequences, struck the blow which instantly destroyed his kind and indulgent master. Who shall say that there was not in this more of vengeance, than sudden heat and passion? If there was, it is murder by the common law, as above expounded, though the controversy had been between freemen and equals. But this exposition of the law upon the subject of murder and manslaughter as between equals, is based upon the ground, that the personal violence resented is a wrong inflicted; but are there no cases adjudged by the common law, where the personal violence cannot be resisted, because it is legally inflicted, and if it be and death ensues, the person perpetrating it is guilty of murder or manslaughter, according to the circumstances and the nature of the weapon used? Assuredly there are. A master may correct in moderation his apprentice, a schoolmaster his scholar, a guardian his ward, a parent his child, an officer may arrest and imprison offenders, he may inflict legal punishment upon criminals. In all those cases the personal injury inflicted, if it exceed not the bounds of moderation, is lawful correction, and if the person upon whom it is inflicted resist and slay, he is guilty of murder and not of manslaughter, for the law cannot admit of the provocation. The peace, the harmony, the good order and well being of society require, in the existence of these relations, that such should be the right of power and command on the one part, and duty and submis-

¹ Archbold's *Crim. Law*, 392.

² 1 Russell, 440; *Mason's case*, Fost. 132; 1 East, P. C. 239; *Roscoe*, *Crim. Ev.* 627.

³ 7 C. & P. 817.

sion on the other. If the right of resistance were warranted in such cases, as it is between freemen and equals, the foundations of society would be broken up, and in place of obedience and submission to the laws, the land would be filled with violence and bloodshed. The common law then has made provision for resistance where resistance is lawful, but has prohibited it in all those relations, where the infliction of punishment, as a lawful correction, is necessary for the proper organization and discipline of society. If slavery were introduced into England, can it be a matter of doubt, that the common law would at once expand, so as to embrace the relation of master and slave, as it had already done those of a kindred character, master and apprentice, schoolmaster and scholar, parent and child, officer and prisoner? None, as we think, whatever. Why may not this be done in this state? Why it may not, no satisfactory reason has been or can be given. Assuming the position, then, that the common law as it exists in the State of Tennessee, is of sufficient scope and power to regard the institution of slavery, to preserve the harmony of its relation, to protect the master and slave in the mutual enjoyment of the rights secured to them, let us proceed to examine what those rights are in relation to the subject under investigation. Unconditional submission is the duty of a slave; unlimited power is, in general, the right of the master; but unquestionably there are exceptions to this rule. It is certain that the master has not the right to slay his slave, or inflict upon him what the law calls great bodily harm, to wit, maiming or dismembering him, or such punishment as puts his life in great and useless peril, and that the slave has a right to defend himself against such unlawful attempts on the part of the master. But the right to obedience and submission, in all lawful things on the part of the slave, is perfect in the master; and the power to inflict any punishment, not affecting life or limb, which he may consider necessary for the purpose of keeping him in such submission and enforcing such obedience to his commands, is secured to him by law, and if in the exercise of it, with or without cause, the slave resist and slay him, it is murder and not manslaughter; because the law cannot recognise the violence of the master as a legitimate cause of provocation. Such we hold to be the law. This is, we believe, the first case in which the courts of this state have been called upon for an application of this principle; but it has been adjudged in other places, to which we may refer for light and instruction, as we do upon all other principles of the common law, of doubtful or difficult application. In the case of the State *v. Will*,¹ Judge Gaston, (than whom no man is higher authority,) in delivering the opinion of the court, says: "Had the prisoner resisted an arrest, (previously to the shooting) and in the course of the struggle inflicted the mortal wound on the deceased, there is no doubt his crime, in legal contemplation, would have been murder; nothing had then occurred, which could have excited in any but a cruel and wicked heart, in a heart fatally resolved on illegal resistance, at whatever risk of death or great bodily harm, a passion so violent and destructive in its consequences. It is not to passion, as such,

¹ 1 Dev. & Bat. 121.

that the law is benignant, but to passion springing from human infirmity.' The principle thus announced, is directly applicable to the present case. The prisoner did resist an arrest; there had been no attempt on the part of his master to endanger his life, and he did kill him in this his illegal resistance, and the conclusion follows that he is guilty of murder. In the case of *The State v. Jarratt*,¹ it is held, 'that the same matters, which would be deemed in law a sufficient provocation to a free white man, who has committed homicide in a moment of passion, from the guilt of murder, will not have the same effect, where the party slain is a white man, and the offender a slave. The rule, that where parties become enraged and suddenly heated in mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applies to equals, and not to the case of a white man and a slave, if the slave kill the white man under such circumstances. And an ordinary assault and battery committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide of the former by the latter, from murder to manslaughter.' These authorities meet our approbation, they are supported by reason and necessity, and we think expound the law correctly, and are decisive of the present case. We might here, if it were deemed necessary, enter into a more minute examination of the relation of master and slave, with a view to the extraction of principles, which might be more applicable to cases not like the present, arising out of it hereafter, but we do not think it expedient or proper. If cases arise, presenting shades of difference from the present, it will then be time enough to examine them; this blow has been struck, it is all that has now to be expiated; and 'sufficient for the day is the evil thereof.' Some criticisms have been made at the bar upon the charge of the judge below; but we think it substantially correct. It is true he might have been more explicit upon the distinction between murder and manslaughter, and if, from the facts of the case, there had been any pretence for holding the killing to be manslaughter, it should have been. But there is none, and a charge upon the subject would have been a charge upon abstract principles, having nothing to do with the facts of the case. It will be observed, that the question made as to murder or manslaughter, does not arise out of a controversy about facts, but about the application of a principle of law, and upon the settlement of the principle, the question is settled, so that no good would have resulted to the prisoner from more minuteness on the part of the judge. The judgment of the court below is therefore affirmed." Green, J., delivered the following opinion: "I think proper to announce distinctly, as my opinion, that there may exist cases, in which the killing of the master by his slave, would be manslaughter. What circumstances of torture, short of endangering life or limb, would so reduce a homicide, it is not easy to indicate. Every such case must rest upon its own peculiar facts. The rights and duties of the parties must form the criteria by which an enlightened court and jury should act. But the present case is destitute of a single mitigating circumstance, and is most clearly one of murder."²

¹ 1 Iredell, 76.

² Jacob v. State, 3 Humphreys, 513.

If a white man wantonly inflicts on a slave over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills, without evincing by the means used great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination. The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present, and instantly kills the assailant, without in like manner, evincing, by the means used, great wickedness or cruelty.¹

"From the nature of the institution of slavery," says Pearson, J., "a provocation, which given by one white man to another, would excite the passions and 'dethrone reason for a time,' would not, and ought not to produce the effect, when given by a white man to a slave. Hence, although, if a white man receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be *murder*; for accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to 'dethrone reason,' and must be ascribed to a 'wicked heart, regardless of social duty.'" That such is the law, is not only to be deduced, as above, from primary principles, but is a necessary consequence of the doctrine laid down in Tackett's case.² "Words of reproach, used by a slave to a white man, may amount to a legal provocation, and extenuate a killing from murder to manslaughter?" The reason of this decision is, that, from our habits of association, and modes of feeling, insolent words from a slave, are as apt to provoke passion as blows from a white man. The same reasoning by which it is held, that the ordinary rules are not applicable to the case of a white man, who kills a slave, leads to the conclusion that they are not applicable to the case of a slave who kills a white man. "The announcement of this proposition, now, directly made for the first time, may have somewhat the appearance of a law, *made after the fact*. It is, however, not a *new law*, but merely a new application of a well settled principle of the common law. The analogy holds in the other relations of life, parent and child, tutor and pupil, master and apprentice, master and slave. A blow given to the child, pupil, apprentice or slave, is less apt to excite passion than when the parties are two white men, 'free and equal;' hence, a blow, given to persons filling these relations is not, under ordinary circumstances, a legal provocation, because it is less apt to excite passion than between equals. The analogy fails only in this: in the cases above put, the law *allows* of the *infliction of blows*. A master is *not* indictable for a battery upon his slave; a parent, tutor, master of an apprentice, is not indictable, except there be an excess of force; whereas the law *does not allow a white man to inflict* blows upon a slave who is *not his property*, he is liable to indictment for so doing. In other words, in this last case, the blow is not a legal provocation, although the party giving it is liable to indictment; while in the other cases, wherever the blow subjects one party to an indictment, it is legal provocation for the other party. This is a departure from the legal analogy, to the prejudice of the slave. It is supposed a regard

¹ State v. Cæsar, 9 Iredell Law R. 391.

² 1 Hawks, 217.

to due subordination, makes it necessary, but the application of the *new principle*, by which this departure is justified, should I think, be made with great caution, because it adds to the list of constructive murders, or murders by malice implied. Assuming that there is a difference, to what extent is the difference to be carried? In prosecuting this inquiry, it should be borne in mind, that the reason of the difference is, that a blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain, as well as a sense of injustice: all or either of which, are calculated to excite passion; whereas a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain, and a sense of wrong; for, in the language of Chief Justice Taylor, in *Hale's case*,¹ 'the instinct of a slave may be, and generally is, turned into subserviency to his master's will, and from him, he receives chastisement, whether it be merited or not, with perfect submission: he knows the extent of the dominion assumed over him, and the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights and prompt the slave to resistance.' "We have seen that the general rule is, that whenever force is used upon the person of another, under circumstances amounting to an indictable offence, such force is a legal provocation; otherwise it is not. "By this rule, 'Will's case,'² would have been a case of murder, for, it was settled in 'Man's case,'³ that a master is not indictable for a battery on his own slave, however severe or unreasonable. But Will was held guilty of manslaughter only, the court feeling itself constrained to make some allowance for the feelings of nature. By this rule, if a slave who has been guilty of insolence, receives a blow from a white man, it is a legal provocation, for the white man has committed an indictable offence.⁴ This case would be as strong an authority, to show that the case above put was but manslaughter, except for reasons of policy, and the necessity of keeping up due subordination, as Man's case, was to show, that Will's case was a case of murder except for an allowance for the feelings of nature. "In the case above put, a blow is supposed, unaccompanied by bodily pain or unusual circumstances of oppression, the only incentive to passion being a sense of degradation, which a slave is not allowed to feel. When bodily pain or unusual circumstances of oppression occur, one or both is sufficient to account for passion, putting a sense of degradation out of the question, and there would be legal provocation. "I think it clearly deducible from *Hale's case*, and analogies of the common law, that if a white man, wantonly inflicts, on a slave, over whom he has no authority, a severe blow, or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills without evincing, by the means used, great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination. "This latter consideration, perhaps, requires the killing should be *at the instant*; for it may not be consistent with due subordination, to allow a slave,

¹ 2 Hawks, 482.² 1 Dev. & Bat. 121.³ 2 Dev. 263.⁴ *Hale's case*, 2 Hawks, 582.

after he is extricated from his difficulty and is no longer receiving blows, or in danger, will return and seek a combat. A wild beast wounded or in danger, will turn upon a man, but he seldom so far forgets his sense of inferiority, as to seek a combat. Upon this principle, which a man has in common with the beast, a slave may, without losing sight of his inferiority, strike a white man when in danger, or suffering wrong; but he will not seek a combat after he is extricated. "If the witness, Dick, while one white man was holding his hands, and the other was beating him, had killed either of them, there would have been no difficulty in making the application of the above principles, and deciding that the above killing was but manslaughter, and of a mitigated grade, contrasted with Will's case, who, although he did not seek the combat, but was trying to escape, killed his *owner* with a knife, after being guilty of wilful disobedience; and the confirmation from the reasoning of Judge Gaston, in Jarratt's case, where the prisoner had it in his power to avoid the combat if he would, and struck *several blows after the white man was prostrated*. "In making the applications of the principles before stated to the case of the prisoner, another principle is involved. The prisoner was not engaged in the fight—he was the associate and friend of Dick, and was present, and a witness to his wrongs and sufferings. We have seen that had he been a white man, his offence would have been but manslaughter, "because of the *passion* which is *excited*, when one sees his friend assaulted."¹ But he is a slave, and the question is, does that benignant principle of the law, by which allowance is made for the infirmity of our nature, prompting a parent, brother, kinsman, friend, or even a stranger to interfere in a fight and kill, and by which it is held, that, under such circumstances, the killing is ascribed to *passion* and not to *malice*, and is manslaughter, not *murder*; does this principle apply to a slave? or is he commanded, under *pain of death*, not to yield to these feelings and impulses of human nature, under any circumstances? I think the principle does apply, and am not willing by excluding it from the case of slaves, to extend the doctrine of constructive murder beyond the limits now given to it by well-settled principles. The application of this principle will, of course, be restrained and qualified to the same extent, and for the same reasons, as the application of the principle of legal provocation, before explained. A slight blow will not extenuate; but if a white man wantonly inflicts on a slave, over whom he has no authority, a severe blow, or repeated blows, under unusual circumstances, and another yielding to the impulse natural to the relations above referred to, strikes at the instant, and kills, without evincing by the means used, great wickedness or cruelty, the offence is extenuated to manslaughter.

¹ See the case cited from Coke's Reports, and the other authorities.

CHAPTER XII.

EVIDENCE IN HOMICIDE.

It is proposed at present to touch upon such points only as are peculiar to the law of homicide, which will be considered as follows:—

1. Dying declarations.
2. Proof of corpus delicti.
3. Presumptions in homicide.
 - 1st. Marks of violence, indicating
 - (1.) Weapon.
 - (2.) Accident, self-inflicted or given by another.
 - (3.) Premeditation or passion.
 - 2d. Instrument of death.
 - 3d. Poison.
 - 4th. Materials appropriate to be converted into instruments of crime.
 - 5th. Detached circumjacent bodies.
 - (1.) Position of the deceased.
 - (2.) Traces of blood.
 - 6th. Liability to attack, from
 - (a.) Possession of money.
 - (b.) Old grudge.
 - (c.) Jealousy.
 - 7th. Presumptions in infanticide.
 - (1.) Condition of the body of the child.
 - (2.) Persons suspected.
 - (3.) Causes of death.
 - (4.) Quickness.

1. *Dying declarations.*¹

The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are constantly admitted in criminal prosecutions, where the death is the subject of criminal inquiry, though the accused was not present when they were made, and had no opportunity for cross-examination,² against or in favour of the party charged with the death.³ For it is considered that when an individual is in constant expectation of immediate death, all temptation to falsehood, either of interest, hope, or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court

¹ This section is chiefly drawn from Wharton's *Crim. Law*, 2d ed., 247.

² See 1 Phill. Ev. 223; 1 Stark. Ev. 101; *People v. Green*, 1 Denio, 614.

³ *R. v. Scaife*, 1 M. & Rob. 551.

of justice.¹ When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court.² The constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common law principle that the declarations in *extremis* of the murdered person, in such cases, are admissible in evidence.³

Dying declarations are admitted from the necessity of the case, to identify the prisoner, and to establish the circumstances of the *res gestæ* or direct transactions from which the death results; when they relate to former and distinct transactions, they do not seem to come within the principle of necessity. Therefore, it seems that a dying declaration that the prisoner had two or three times previously attempted to kill him, is not admissible.⁴

Dying declarations, however, are not admissible unless it appear to the court that they were made under a sense of impending dissolution,⁵ and a consciousness of the awful occasion,⁶ though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made.⁷ Where the party expressed an opinion that she would not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible.⁸ But it is not necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury,⁹ which may be collected from the general circumstances of his condition; as when the party was a member of the Romish church, and had confessed, been absolved, and received extreme unction before making the declaration.¹⁰

The mere fact that a slave after receiving his mortal wound, was heard to cry out "O my people," is not alone sufficient evidence of the expectation of immediate death, to authorize the admission of his declarations.¹¹

¹ 1 Leach, 502; 1 Gilb. Evid. 280; 1 Chit. C. L. 568, 569; Com. v. Murray, 2 Ashmead, 61; Com. v. Williams, Ibid. 69.

² Dunn v. State, 2 Pike, 229.

³ Woodsides v. State, 2 How. Miss. R. 655; Anthony v. State, 1 Meigs, 265; Campbell v. State, 11 Georgia, 355.

⁴ Nelson v. State, 7 Humph. 542.

⁵ R. v. Woodcock, 1 Leach, 562; R. v. Welbourn, 1 East, P. C. 358; R. v. Van Butchell, 3 C. & P. 629; Com. v. Williams, 2 Ashmead, 69; 1 Greenleaf on Ev. s. 158; 2 Russ. on Crimes, 752; Hill's case, 2 Gratt. 594; Nelson v. State, 7 Humph. 542; Moore v. State, 12 Ala. 764.

⁶ R. v. Pike, 3 C. & P. 589; R. v. Crockett, 4 C. & P. 544; R. v. Hayward, 6 C. & P. 157; R. v. Spilsbury, 7 C. & P. 187; Montgomery v. State, 11 Ohio, 424; State v. Poll, 1 Hawks, 442; Dunn v. State, 2 Pike, 229.

⁷ R. v. Mosley, R. & M. 97; 2 Russ. on Crimes, 757.

⁸ R. v. Fagent, 7 C. & P. 238.

⁹ R. v. Bonner, 6 C. & P. 386; Dunn v. State, 2 Pike, 229; 1 East, P. C. 385; R. v. Dingler, 2 Leach, 561; Anthony v. State, 1 Humph. 265; Meigs' R. 265; Hill's case, 2 Gratt. 594; Nelson v. State, 7 Humph. 542; 2 Russ. on Cr. 761.

¹⁰ Com. v. Williams, 2 Ashmead, 69; R. v. Minton, 1 M'Nally, 38.

¹¹ Lewis v. State, 9 S. & M. 115.

A boy, between ten and eleven years of age, was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared, from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was not true; a declaration made by him, at this time, was, therefore, held receivable in evidence on the trial of a person for killing him, as being a declaration *in articulo mortis*.¹

But in a case of murder, it appeared that, two days before the death of the deceased, the surgeon told her that she was in a very precarious state; and that, on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but, as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was considered not receivable in evidence, as a declaration *in articulo mortis*, as it did not sufficiently appear that, at the making of it, the deceased was without hope of recovery.²

In a case before the twelve judges,³ it was held that the declarations of the deceased, made on the day he was wounded, and when he believed he should not recover, were evidence, although he did not die till eleven days after, and although the surgeon did not think his case hopeless, and continued to tell him so till the day of his death. In one case where the party, being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never recover," and in another, where the surgeon having said, "You are in great danger," the party replied, "I fear I am;" declarations subsequently made were admitted.⁴ In *R. v. Christie*,⁵ the deceased asked his surgeon if the wound was necessarily mortal; and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement. This statement was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration *in articulo mortis*, as it did not appear that the deceased thought himself at the point of death; for, being told that the wound was not necessarily mortal, he might still have had a hope of recovery. And where the only evidence of the dying man being aware of his situation, consisted in his saying "he should never recover," it was held insufficient.⁶

In New York, it has been laid down in a Circuit Court, that dying declarations should not be excluded in all cases where there is a faint and lingering hope of recovery.⁷ But such a relaxation of the rule is without precedent, and though perhaps a case might arise where the fact that the deceased entertained, at a particular moment, a fugitive and transient hope, would not exclude the evidence, yet it is best to take the rule without qualification.⁸ The fact of the declarations not being made immediately previous to death, is not fatal

¹ *R. v. Perkins*, 9 C. & P. 395.

² *R. v. Megson*, 9 C. & P. 418.

³ *R. v. Mosley*, Ry. & M. C. C. R. 97.

⁴ *R. v. Craven*, Lewin's C. C. 77; *R. v. Simpson*, Lew. C. C. 78.

⁵ Car. C. L. 232, O. B. 1821.

⁶ *R. v. Van Butchell*, 3 C. & P. 631.

⁷ *People v. Anderson*, 2 Wheel. C. C. 398.

⁸ *Sta e v. Moody*, 2 Haywood, 31.

to them, provided the deceased was conscious at the time he was in a dying situation.¹

Where the deceased said on the evening before the morning of her death, "Mr. F. has killed me," and about the same time, "I am dead, Mr. F. has killed me;" it was held that the declarations were admissible as the dying declarations of the deceased.²

Where the deceased, on the day the mortal blow was inflicted, was told that his deposition ought to be taken, as he must inevitably die before morning, and he replied, he thought so too, and afterwards exclaimed, "O Lord, I shall die soon," it was held that his declarations, reduced to writing, and signed by him at that time, were admissible as dying declarations, although he lived ten days after.³

In a case in Virginia, a person having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval that elapsed before his death, to speak at all, and when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death, was asked, "Did P. V. strike you first?" To which he answered, "Yes, sir." "Did P. V. stab you?" to which he also answered, "Yes, sir." "Do you think you are going to die?" to which he again answered, "Yes, sir," and was asked a fourth question, which he was unable to answer, but it did not appear what this fourth question was, or whether it had any relation to the subject, or at what interval after the three first it was put to the dying man; it was held that the declarations, being distinct and complete in themselves, were competent evidence on the trial of P. V. on an indictment for the homicide. But, if it had appeared that the declarations were uttered by the dying man, to be connected with, and qualified by other statements, and with them to form an entire complete narrative, and before the purposed disclosure was fully made, it had been interrupted, and the narrative left unfinished; such partial declarations, it was said, would not have been competent evidence.⁴

The objection that the questions to which the answers of the dying man were given, were leading questions, is not properly applicable in such a case.⁵

The declarations are only admissible where the death is the subject of the charge, and the circumstances of the death are the subject of the declaration.⁶ Thus, in a case where the prisoner was indicted for administering savin to a woman pregnant, but not quick with a child, with intent to procure abortion; the woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge who tried the case, rejected the evidence, observing that, although the declaration might relate to the causes of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.⁷ In another case⁸ the defendant having been convicted of perjury, a

¹ *State v. Poll*, 1 Hawks, 442; *R. v. Mosley*, R. & M. 97.

² *State v. Freeman*, 1 Speers, 57.

³ *M. Daniel v. State*, 8 S. & M. 401.

⁴ *Vass v. Com.* 3 Leigh, 786.

⁵ *Ibid.*

⁶ 2 Russ. on Crimes, 761.

⁷ *R. v. Hutchinson*, 2 B. & C. 608; *Wilson v. Boerem*, 15 Johns. 286.

⁸ *R. v. Mead*, 2 B. & C. 605; 4 D. & R. 120, S. C.

rule *nisi* for a new trial was obtained; whilst that was pending the defendant, Mead, shot the prosecutor, Law; and, on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter as to the transaction out of which the prosecution for perjury arose. The court held that it could not be read; for dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death are the subject of the declaration. So, in trials for robbery, the dying declarations of the party robbed are rejected.¹ In *Wright v. Littler*,² however, the declarations of subscribing witnesses, confessing the forgery of a deed were admitted;³ but in *Doe & Sutton v. Ridgway*,⁴ Abbott, C. J., says that the cases cited, viz. those of the deceased persons, in cases of murder or manslaughter, or subscribing witnesses to deeds, confessing the deeds to be forged, are the only exceptions to the general rule of not receiving evidence unless upon oath, and with the opportunity of a cross-examination; and Bayley, J., observes, that the declarations admitted in the case of *Aveson v. Kinnaird*,⁵ were part of the *res gestæ*.

On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to the cause of her death, are competent evidence against the prisoner.⁶

The dying declaration of a husband is competent evidence against the wife to show her guilt.⁷

The dying party, to make the declarations evidence, must, at the time of their making, have an idea of a future state; therefore, the declarations of a dying child, only four years of age, have been held inadmissible.⁸ But if the child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences in future state of telling a falsehood, his declarations, made under a sense of impending dissolution are admissible.⁹ Thus, the dying declarations of an intelligent child ten years old have been admitted.¹⁰

A copy of dying declarations, taken down in writing by a magistrate, is inadmissible in evidence, though if the declarations are sworn to by the magistrate, they would be admissible.¹¹ If, however, the magistrate swears that he cannot recollect the statement of the deceased, the written statement taken by him would be secondary evidence.¹²

Nothing can be evidence, in a declaration *in articulo mortis*, that would not be so, if the party were sworn. On this rule, any thing the murdered person, *in articulo mortis*, says as to facts, is receivable, but not what he says as matter of opinion.¹³ If the declaration of the deceased, at the time of his making it, be reduced into writing, the written document must be given in evidence, and no parole testimony

¹ Per Bailey and Best, J. J., 1822, 1 Phillips' Ev. 225; *R. v. Lloyd*, 4 C. & P. 233; see *R. v. Baker*, 2 M. & Rob. 58; 1 Green, 156, n. 2.

² 3 Burr. 1244.

³ 4 B. & Al. 54.

⁶ *People v. Green*, 1 Denio, 614.

⁸ *R. v. Pike*, 3 C. & P. 598; 2 Russ. on Crimes, 765.

⁹ 2 Russ. on Crimes, 765.

¹⁰ *R. v. Perkins*, 2 M. C. C. 135; S. C. 9 C. & P. 395.

¹¹ *Beets v. State*, 1 Meigs, 10.

¹² *Ibid.*

¹³ *R. v. Sellers*, O. B. 1796, Car. C. L. 233.

⁵ See *Aveson v. Lord Kinnaird*, 6 East, 195.

⁶ 6 East, 188.

⁷ *Moore v. State*, 12 Ala. 764.

respecting its contents can be admitted.¹ And if a declaration, *in articulo mortis*, be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parole evidence of the declaration.² But, where the dying person repeated his declaration three several times in the course of the same day, the fact of its having been committed to writing in the presence of a magistrate, on the second occasion, will not, it seems, exclude parole evidence of the others, where it is not in the power of the prosecutor, at the trial, to give that which has been committed to writing in evidence.³ And on one occasion, in Ireland, in a case where the depositions of the individual were made at the time when he thought himself dying, taken down by a magistrate, and not in the presence of the prisoner, it being objected at the trial that the depositions were not pursuant to the statute,⁴ the magistrate was sworn, and gave parole evidence of the declarations of the deceased.⁵

The dying declarations of a criminal at the scaffold will not be thus admissible, because his oath could no longer have been received in a court of justice, after his blood is corrupted.⁶

It seems that where the declarations of the injured party are part of the *res gestæ*, they are admissible without proof of a consciousness of approaching death.⁷

The court are to decide as to the admissibility of the declaration.⁸

The same principles of law are applicable to the contradictory statements of persons *in extremis*, as to those of a witness under examination on oath.⁹ Where the court below charged the jury, "that if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness," it was held that this charge was erroneous.¹⁰

It seems that evidence is admissible, on part of the defence, to impeach the character of the deceased for truth; he standing on the same footing as a witness called into court and there examined; and, in one case, where the dying declarations of the deceased were admitted to show that the defendant, with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to show that she was considered a woman of loose character and light reputation.¹¹ It has been held, however, that it is not competent for the prisoner to prove that before the affray, the deceased had expressed a violent hatred to him, and a disposition to do him injury, or that he was very hostile to him.¹²

¹ Vin. Ab. Evid. 38, A. b.

² R. v. Gay, 7 C. & P. 230.

³ R. v. Reason, 1 Str. 500; 16 How. St. Tr. S. C.

⁴ 10 Car. c. 1, Irish.

⁵ R. v. Callaghan, 1 M'Nally, 385; R. v. Woodcock, 2 Leach, 563.

⁶ Drummond's case, 1 Leach, 337; 2 Russ. on Crimes, 763; 2 Hawk. c. 46, s. 51.

⁷ Com. v. M'Pike, 3 Cush. 181.

⁸ 1 Leach, 504; R. v. Hucks, 1 Stark, 532; R. v. Van Butchell, 3 C. & P. 629; 2 Russ. on Crimes, 761; 1 Greenleaf on Evid. s. 160; M'Daniel v. State, 8 S. & M. 401; Hill's case, 2 Gratt. 594.

⁹ M'Pherson v. State, 9 Yerger, 279.

¹⁰ Ibid.

¹¹ People v. Knapp, per Edmonds, J., MSS.; see Carter v. People, 2 Hill's N. Y. R. 317.

¹² State v. Varney 8 Boston Law Reporter, 562.

Where dying declarations, made under the belief of impending death, are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which or whether either is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions, it is error.¹

2. *Proof of Corpus delicti.*

The fact of the commission of the offence must necessarily be the foundation of every criminal suit, and until that fact is proved, most dangerous would it be to convict. "I would never," says Lord Hale, "convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead."² Equally emphatic was the language of another great judge. "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."³ And the civil law is the same: "*Diligenter cavendum est iudici, ne supplicium præcipitet, antiquam de crimine constiteret.*"⁴ "*De corpore interfecti necesse est ut constet.*"⁴ The death in such a case should be distinctly proved, either by direct evidence of the fact, or by inspection of the body.⁶ The proof must be clear and distinct: thus in a case of horse-stealing, a mere declaration in evidence that the horse had been stolen, is not sufficient evidence of the *corpus delicti*. The facts must appear, so that the judge and jury may see whether such facts in point of law amounted to a felonious taking and carrying away of the property in question.⁷

¹ Moore v. State, 12 Ala. 764.

² 2 Hale, P. C. 290; Tyler v. State, 5 Humph. 383; and see, generally, Wharton's C. L. b. i. c. 1, s. 7, 8, from which these pages are drawn.

³ Lord Stowell, in Evans v. Evans, 8 Hagg. C. R. 105.

⁴ Matth. de Crim. in Dig. lib. 48, tit. 16, c. 1.

⁵ Matth. Probat. c. 1, n. 4, p. 9.

⁶ 1 Stark. Ev. 575, 3d, c. 5.

⁷ Tyner v. State, 5 Humphrey, 383. The reference to facts, which, having in themselves no bearing upon the guilt or innocence of the party, are important as leading to inferences in regard to it, is called, in Germany, "indicatory evidence." On this point, the curious are referred to Mittermaier, von Beweise, p. 402; Martin, in Denme's Annalen des Criminalrechts, vol. iii., p. 215; Bauer, Theorie des Anzeigenbeweises; Quistorp Grunds. s. 676; Henke Darstellung. s. 99; Tittman Handb. iii. p. 495; Kitka Beweislere, p. 13. Of the old Jurists, see Blanci de indicis. Venet. 1545; Bruni Guido de Suzaria de indicis et Tortura Lugd. 1546, Crusuis de Tortura et indicis Francof. 1704; Menochius de præsunet, Colon. 1686; Tabor de indic. delict.; Giess. 1767, Cocieji de fallæ, crim. indic. in ejus exer. cur. p. i. uro. 75; Reinhardt de eo quod circa reum ex præsumpt. convinc. et cond. just. est. Erford, 1732; Woltaer femiol, crim. quæd capita Ital. 1790; Puettman de lubrico indie. indol. Lips. 1785; Nani de indicis eorumque. usu, Ticin. 1781; Pagano logica de probabili applicata a guidizi crimin. Milan, 1806; Heinroth in Hitzig's Zeitschrift, No. 42, p. 257; Wills' Essay on the Rationale of Circumstantial Evidence. The term "Circumstantial Evidence," is objected to by the German jurists, (see Bauer, p. 1214.) Indications are divided into, 1st, Those which are drawn from the *particular* relation of the circumstances to the fact in issue, so as to implicate a particular person, either as a participant in the crime, or as a possessor of information in regard to it; e. g., where a knife, the possessor of which is known, is found at the locus in quo. 2d, Those which set out, from general observations of human nature, inducing suspicion against particular individuals, by reason of particular moral qualities, motives, information, skill, or demeanor, e. g., suspicions on

In most cases the proof of the crime is separable from that of the criminal. Thus, the finding of a dead body, or a house in ashes, indicate the probable crime, but do not necessarily afford any clue to the perpetrator, and here it is necessary to draw a distinction relative to the effect of presumptive evidence. The *corpus delicti* in such cases is made up of two things: first, certain facts forming its basis; and, secondly, the existence of criminal agency as the cause of them. With respect to the former of these, it is the established rule that the facts which form the basis of the *corpus delicti*, ought to be proved either by direct testimony, or by presumptive evidence of the most cogent and irresistible kind. This is particularly necessary in cases of murder, where the rules laid down by Lord Hale, seem to have been generally followed, namely, that the facts of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or if found in a state of decomposition, or reduced to a skeleton, it should be identified by dress or circumstances, as in the Webster case, where the teeth formed the chief means of identification, and in a leading English case, where the same test was successfully applied to a body exhumed after a lapse of twenty-three years.¹ There are some old cases which go far to establish the sound policy of this rule. One given by Sir E. Coke has been already cited, where an uncle being unable to account for the disappearance of a niece of whom he had the bringing up, was executed for her murder, though it afterwards appeared that she had fled from home, to which, in fact, after a lapse of some years she returned; and Doctor Hitzig gives several illustrations to the same effect.² Lord Hale even tells us that in his own time, after a murderer was convicted and executed, the "deceased" returned from sea, where he had been sent against his will by the accused, who, though innocent of the murder, was not entirely blameless.³ In our own country, the alleged victim in one case made his appearance just in time to save him who had been indicted for murdering him, and who actually had made a confession of guilt, from being hung.⁴ Should the decease be proved by eye witnesses, the inspection of the body after death may of course be dispensed with. Thus, in a case in England,⁵ the prisoner, a seaman on board of the ship *Eolus*, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by a blow from a large piece of wood, and the second by throwing the deceased into

the grounds of enmity toward the deceased, or interest; see also *Archiv. des Criminals*, xiv. p. 587. The first species justifies the inquisitor in arresting and hearing the person implicated, and demanding an explanation, while in the latter case, he dare not go further than to cause the person to be watched, or examine him as a witness. There is also a distinction between *immediate* indications, (*Bayl Beitrage zum Criminale*, p. 215; *Bentham, traite i.* p. 313,) which authorize the inference in regard to the fact, without the intervention of other circumstances; and *mediate* ones, which only prove such facts from which a further inference can be drawn, in regard to the very matter in issue, e. g. approval of the crime, which leads to the inference of a disposition to commit it. The doctrine of presumptions of law, and presumptions of fact, are inapplicable to criminal investigations, these being matter of *intention*.

¹ *R. v. Clewes*, 4 C. & P. 22.

² *Der neue Pitaval*, &c.

³ 2 Hale, P. C. 290; see also, *Best's Theory*, App. Case, 5.

⁴ *Boorn's Case*, 1 Greenleaf on Ev. sec. 214.

⁵ *R. v. Hindmarsh*, 2 Leach's C. L. 569,

the sea. It appeared in evidence that while the ship was lying off the coast of Africa, where there were several other vessels near, the prisoner was seen one night to take the captain up in his arms, and throw him into the sea, after which he was never seen or heard of; that near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighbouring vessels; but the court, although they admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed.¹

It is not pretended that in every case the dead body must be found, or the owner of the property alleged to be stolen discovered. Mr. Bentham suggested the illustration of the decomposition of the body by lime, or by any other of the known chemical menstrua, or of its being submerged in an unfathomable part of the sea, and asks whether in such a case, when the homicide is proved *aliunde*, the defendant is to be acquitted.² Unsuccessful attempts of such a kind have undoubtedly been made, and that the result may have been obtained, appears probable from a recent melancholy instance in Philadelphia, where a gentleman of the highest professional standing, who had won the respect and kind feelings of all, and to whose professional and personal worth the editor gladly takes this opportunity of paying tribute, was killed less than eight hours so entirely consumed by the fire in the cellar of a burning house, into which he had fallen, as to leave scarcely a vestige of bone or flesh behind.

The cases cited by Mr. Bentham, Dr. Hitzig, and Mr. Willis, it is not practicable now to consider; and perhaps the necessity is somewhat obviated by the very thorough examination which the question underwent in the Webster case. It will be recollected that there, the furnace attached to the defendant's laboratory, were found portions of lime and blocks of mineral teeth. These fragments, together with others elsewhere found, having been collected, were identified as those of Dr. Parkman, the teeth having been declared by a dentist to be the parts of a set made for the deceased. It was evident that an attempt had been made to destroy the body by fire or other chemical agency, and the testimony of experienced medical gentlemen was taken with reference to this point. Dr. Strong testi-

¹ *R. v. Hindmarsh*, 2 Leach, 569. It was urged on the prisoner's behalf, at the trial, by Garrow, (the late Mr. Baron Garrow,) that he was entitled to be acquitted, on the ground that it was not proved that the captain was dead; and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was, that he was taken up by some of them, and was then alive. And the learned counsel mentioned a remarkable case which had happened before Mr. Gould. The mother and reputed father of a bastard child were observed to take a child to the margin of the dock, at Liverpool; and, after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and as the tide of the sea wed and reflowed into and out of the dock, the learned judge, upon the trial of the mother and father for the murder of their child, observed, that it was possible the tide might have carried out the living infant; and upon this ground the jury, by his direction, acquitted the prisoners. But *quære*, the form of the indictment in this case.

² *Bentham, Jud. Ev.* 234.

fied that he had frequently found it necessary to get rid of the remains of a subject by fire; and that upon one occasion wishing to consume the flesh of the body of a pirate, he had placed it upon a large wood fire, and succeeded in concluding the operation in the course of one night and the forenoon of the next day, although called upon during that time by the police to know what made such a smell in the street.¹ Dr. Jackson says "that the flesh of a human body if cut up into small pieces and boiled in potash, might be dissolved in two or three hours. Next to this the best substance to use in dissolving or disposing of a human body would, I should think, be nitric acid, and the difficulty or danger attendant upon its use so far as the evolution of noxious vapour is concerned, would depend upon the degree of heat applied. If a gentle heat were used, very little nitrous acid would be given off; but if the acid were boiled there would be a great deal, though the dissolution of the body would be most rapid at a boiling temperature."²

The cases which present the greatest difficulty in establishing the *corpus delicti*, are those of infanticide, poisoning, and suicide.

Where upon an indictment against the prisoner for the murder of her bastard child, it appeared that she was seen, with the child in her arms, on the road from the place where she had been at service to the place where her father lived, about six in the evening, and between eight and nine she arrived at her father's, without the child, and the body of a child was found in a tide-water, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to show that it was not the body of such child; it was held that she was entitled to be acquitted; the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to show that her child was actually dead.³

The weight of authority now clearly is that, in cases of alleged infanticide, it shall be clearly proved that the child had acquired an independent circulation and existence, and it is not enough that it had breathed in the course of its birth;⁴ and a very eminent and humane American judge extended the same test—though with questionable propriety,—to the case of a child some months old, whom the mother, during an attack of puerperal fever, had thrown out of the window of a steamboat.⁵ If, however, a child has been wholly born, and is alive, it is not essential, as will be fully discussed hereafter, that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after birth.⁶

In trials for poisoning it should be observed that it does not necessarily follow, even where poison has been administered, that death

¹ Bemis' Report of Webster Case, 69.

² Ibid. 75, 76.

³ R. v. Hopkins, 8 C. & P. 591.

⁴ Wills, p. 205; R. v. Poulton, 5 Car. & Paine, 399.

⁵ U. S. v. Hewson, 7 Boston Law Rep. 361, Story, J.; though see Com. v. Harman, 4 Barr. 269.

⁶ See R. v. Brain, 6 Car. & P. 350.

resulted from other than natural causes.¹ The presence of poison may be ascertained by the symptoms during life, the post mortem appearances, the moral circumstances, and by far the most decisive and satisfactory evidence, the discovery by chemical means of the presence of poison in the body, in the matter ejected from the stomach, or in the food or drink of which the sufferer has partaken.

Suicide and accident are sometimes artfully suggested and plausible as causes of death, where the allegation cannot receive direct contradiction; and in such cases the truth can be ascertained only by a comparison of all the attendant circumstances, some of which, if the defence be false, are commonly found to be irreconcilable with the cause assigned. It may also happen that the supposed *corpus delicti* is the result of accident or carelessness. In one unhappy instance, in France, a respectable man was convicted and executed, on the strength of the presumption of a number of articles of silver, which were missing, having been found in a place to which he never had access, and which were afterwards discovered to have been deposited there by a magpie.

The somewhat fanciful defence of somnambulism, also, which in this country was attempted in Tyrrell's case, may derive sometimes plausibility from the following curious illustration, which is given by a writer of the last century. Two persons who had been hunting during the day, slept together at night. One of them was renewing his chase in his dream, and, imagining himself present at the death of the stag, cried out aloud, "I'll kill him! I'll kill him!" The other, awakened by the noise, got out of bed, and by the light of the moon perceived the sleeper give several deadly stabs with a knife on the part of the bed his companion had just quitted. Another instance is recorded of a somnambulist who was twice prevented from an apparent attempt to murder his wife by strangling her with his hands, and by being wakened from the bar of a door.

On this point, Chief Justice Shaw said in his charge in the Webster case, "If the jury should come to the conclusion that the evidence is sufficient to prove that Dr. Parkman was abroad out of the Medical College after he entered it, at or shortly before two o'clock, the question recurs whether he lost his life there; and, if so, whether it is under such circumstances as to lead to the belief that it was by the act of a third person, thereby establishing the *corpus delicti*."

The sudden disappearance of a man of known and established habits without apparent cause, and the failure to find him or any trace of him, after diligent search, although they may lead to a

Wills on Circum. Ev. 209. And see 3 Green. on Ev. s. 147. 3 Inst. 57, as limited by Holt, C. J.; 1 Ld. Raym. 143; J. Hale, P. C. 475; 4 Black. Com. 192, 200; 1 East, 231. Foster, 262; 1 Hale, P. C. 474; Grey's case, 1 Kely. 64. See Alison's Law of Scotland, p. 3, 4; 1 Hale, P. C. 431, 432; 1 East, P. C. 225; Palm. 548, Jones, J.; R. v. Walters, 1 Car. & Marsh. 164; 1 Russ. on Crimes, 488; Squires' case, id. 490; Stockdale's case, 2 Lew. 220; R. v. Huggins, 2 Stra. 882; Castel v. Bampton, 2 Stra. 854, 856. 1 Hale, P. C. 457. Watts v. Brains, Cro. El. 778; J. Kely. 1 Hale, P. C. 455, 456; 1 Russ. on Cr. 515; State v. Merrill, 2 Dev. 269. The effect of provocation, and where it reduces the crime to manslaughter, has already been considered. See ante, 168, &c.; and see State v. Hill, 4 Dev. & Bat. 491. State v. John-1 Iredell, 354; State v. Tilly, 3 Iredell, 424; Shoemaker v. State, 12 Ohio R. 423; R. v. Green, 1 Ashm. 289.

strong suspicion that he has come to an untimely end, yet are not alone sufficient proof of his death, because the fact may be accounted for on the hypothesis, (however improbable,) that he may have absconded and eluded all inquiry, or be kidnapped and concealed, and be still alive. But if his dead body be found, it is a fact, in its nature conclusive. It has been sometimes said by judges, that a jury ought never to convict in a case of homicide, unless the dead body be found and identified. This, as a general proposition, is undoubtedly true and correct; and disastrous and lamentable consequences have resulted from disregarding the rule. But, like other general rules, it is to be taken with some qualification. It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory. As in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder. But, if the body can be found and identified, it goes conclusively to one of the facts necessary to be proved,—the death of the person alleged to have been killed. Such proof is relied on in the present case. It is for the jury to judge of it.”

Without this proof, says Mr. Greenleaf,² a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt. But the fact, as we have already seen, need not be directly proved; it being sufficient if it be established by circumstances so strong and intense as to produce the full certainty. Neither is it indispensably necessary to prove that the prisoner had any motive to commit the crime, though the absence of such motive ought to receive due weight in his favour.

The most positive and satisfactory evidence of the fact of death, is the testimony of those who were present when it happened; or who, having been personally acquainted with the deceased in his lifetime, have seen and recognised his body after life was extinct. This evidence seems to be required in the English House of Lords, in claims of peerage; and a fortiori a less satisfactory measure of proof ought not to be required in a capital trial. In these cases the testimony of medical persons, where it can be had, is generally most desirable, wherever the nature of the case is such as to leave any doubt of the fact.³

But though it is necessary that the body of the deceased be satisfactorily identified, it is not necessary that this be proved by direct and positive evidence, if the circumstances be such as to leave no reasonable doubt of the fact. Where only mutilated remains have

¹ *Com. v. Webster*, 3 Cush. 535. *Bemis' Webster case*, 479.

² 3 Green. on Ev. § 132.

³ 1 Hubback on Succession, p. 159, 160. By the Roman Civil law, as well as by ours, the death may be proved not only by those who saw the party dead and buried, but by those who saw him dying, or, who were present at a funeral called his, but who did not see the body. Mascard De Profort Concl. 1077. In some cases, by that law, death might be proved by common form; but not in cases involving highly penal consequences:—non in (casis) graviboros, secus autem in his, quæ modicum damnum afferre possunt. *Idem*. Concl. 1076, n. 1, 3. It might also be proved by circumstantial evidence. But was never to be presumed as an inference of law. *Mors non presumitur, sed est probanda; cum quilibet præsumatur vivere. Idem*. Concl. 1075, n. 1. And see *Idem*. Concl. 1078, 1079. Ante, vol. 2, tit. DEATH.

been found, it ought to be clearly and satisfactorily shown, that they are the remains of a human being, and of one answering to the sex, age, and description of the deceased; and the agency of the prisoner in their mutilation, or in producing the appearance found upon them, should be established. Identification may also be facilitated, by circumstances apparent in and about the remains, such as the apparel, articles found on the person, and the contents of the stomach, connected with proof of the habits of the deceased in respect to his food, or with the circumstances immediately preceding his dissolution.¹

3. *Presumptions.*

"The death and identity of the body being established, says Mr. Greenleaf,² it is necessary, in the next place, to prove that the deceased came to his death by the unlawful act of another person. The possibility of reasonably accounting for the fact by suicide, by accident, or by any natural cause, must be excluded by the circumstances proved; and it is only when no other hypothesis will explain all the conditions of the case, and account for all the facts, that it can safely and justly be concluded that it has been caused by intentional injury. Though suicide and accident are often artfully and falsely suggested in the defence, as causes of the death, especially where the circumstances are such as to give plausibility to the suggestion; yet the suggestion is not on this account to be disregarded; but all the facts relied on are to be carefully compared and considered, and upon such consideration, if the defence be false, some of the circumstances will commonly be found to be irreconcilable with the cause alleged. Scientific evidence sometimes leads to results perfectly satisfactory to the mind; but when uncorroborated by conclusive moral circumstances, it should be received with much caution and reserve; and justice no less than prudence requires that, where the guilt of the accused is not conclusively made out, however suspicious his conduct may have been, he should be acquitted.³

¹ 2 Wills on Cir. Evid. p. 164, 168. See Boorn's case, ante, Vol. I. 214, n. That the name, as well as the person of the deceased must be precisely identified, has already been shown, supra, 22. The subject of the identification of mutilated remains was very fully discussed in the trial of Dr. Webster, and is fully developed in the excellent report by Mr. Bemis.

² 1 Wills on Cir. Evid. p. 168.

³ 2 Ibid, p. 168, 172. On this subject the following important observations are made by Mr. Starkie. It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dishonour, and to preserve his property from forfeiture. Instances have also occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy, by substantiating a charge of murder. On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murders, to perpetrate it in such a manner as to induce a belief that the party was *felo de se*. It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth. Where the circumstances are natural and real, and have not been counterfeited with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore, if any one circumstance which is essential to the case attempted to be established, be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential, cannot be true. The question whether a person has died a natural death, as from apoplexy, or a violent one from strangulation; whether the

This branch of the subject will be considered in the following divisions:—

- 1st. Presumptions drawn from marks of violence, indicating,
 - (1.) Weapon used.
 - (2.) Whether the wounds were accidental, self-inflicted, or given by another.
 - (3.) Whether they were the result of a momentary passionate impulse, or of premeditation.
- 2d. Presumptions drawn from instruments of death.
- 3d. Presumptions drawn from poison.
- 4th. Presumptions drawn from materials appropriate to be converted into instruments of crime.
- 5th. Presumptions drawn from detached circumjacent bodies.
- 6th. Presumptions drawn from liability to attack.
 - (1.) Possession of money.
 - (2.) Old grudge.
 - (3.) Jealousy.
- 7th. Presumptions in infanticide.
 - (1.) Condition of child's body.
 - (2.) Person suspected.
 - (3.) Cause of death.
 - (4.) Quickness.

1st. *Presumptions drawn from marks of violence indicating,*

[The principal part of the following sections will be found in the second edition of Wharton's Crim. Law, under the head of "Preparations for Trial." The demand of the material thus introduced in an independent shape, has led to its adaptation to its present purpose.]

(1.) *Weapon used.*—In ordinary cases the shape of the wound will agree with the instrument with which it has been produced. This is particularly the case with those inflicted by a knife, a dirk, a sword, or a razor, or, in general, by any sharp weapon by which a cut or thrust may be made. If, however, death has been produced by a bruise or contusion, the case presents more difficulty, as it not unfrequently happens that such wounds are unaccompanied with any marks of external violence. In almost every case, however, a careful investigation will lead to the discovery whether the instrument were blunt or sharp, of

death of a body found immersed in water has been occasioned by drowning, or by force and violence previous to the immersion; whether the drowning was voluntary, or the result of force; whether the wounds inflicted upon the body were inflicted before or after death, are questions usually to be decided by medical skill. It is scarcely necessary to remark that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial evidence against him. Even medical skill is not, in many instances, and without reference to the particular circumstance of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is, therefore, in all cases, expedient that all the accompanying facts should be observed and noted with the greatest accuracy; such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in such case of strangulation, the situation of the rope, the position of the knot, and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned. 2 Stark. on Evid. 519, 521, (Cam. Ed.)

wood or of metal, whether the blows were repeated, and whether they were sufficient to cause death. If the wound has been produced by a gun or pistol, it becomes necessary to inquire whether it was received from a person near at hand, or at a distance, whether the aim would appear to have been deliberately taken, and whether the position of the deceased, and the location and direction of the wound are such as sufficiently to indicate the premeditation of the act. Of the effect with which such evidence may be used, an illustration is given by a case some years ago in Ireland. The question was, whether in a scuffle a pistol had accidentally gone off and occasioned the death, or whether the assailant had deliberately fired at him from some distance. The sons of the deceased swore that the pistol was fired from some distance, the prisoner taking deliberate aim. This was confirmed by the dying declaration of the deceased. But on a careful examination of the body, which was disinterred for that purpose, the surgeon was enabled to swear positively, that the pistol must have been fired close to the body of the deceased, as there distinctly appeared the marks of powder and burning on the wrist. So conclusive was this evidence deemed, that the prisoner was acquitted, and the parties who had appeared as witnesses against him were indicted and convicted of perjury.¹ So, also, where the deceased was shot in the street, when looking at a parade, and where the question was whether he was killed by a stray shot, or by a gun which there was some evidence to show was aimed from a third story window, the doubt was solved by the slanting direction of the wound.²

(2.) *Whether the wounds were accidental, self-inflicted, or given by another.*—It will be necessary in the investigation of this point to inquire whether the wounds are of a character, or in a position which render them likely to have been the result of suicide, or whether their nature, location, number, and variety conclusively point to another as having perpetrated the deed. It has been observed that in ordinary cases of suicide, but one wound is inflicted, which proves fatal; and that if the self-destroyer effects his purpose by a cutting instrument, or incisions, he selects the throat; that if he stabs himself, he selects the chest, particularly the heart or belly; and if he shoots himself, he generally does it through the head.³ It, therefore, becomes a subject of legitimate investigation whether, or not, the wounds are in a position likely to have been selected by one seeking instantaneous self-destruction, and whose opportunities and design would be at that which he conceived to be the most vital part. The fact that death by suicide is almost always produced by a single wound is also an important feature in the examination of the body. In New York in 1839, a woman was found dead covered with many wounds. Her husband, who was suspected, asserted that she had destroyed herself. On examination there were found eleven stabs, eight on and about the left side of the thorax, one of which had penetrated the pericardium and divided the trunk of the pulmonary artery at its origin, while the others were on the back near the left shoulder blade. There was every reason to suppose that the stabs in front and at the back

¹ Taylor's Med. Juris. 330.

² Watson on Homicide, 276.

³ Der neue Pitaval, &c.

were inflicted at the same time; and the inference was that it was impossible that the latter could have been self-inflicted.¹ So, too, the variety of the wounds will often sufficiently indicate the fact of murder. William Corder was tried at the Bury St. Edmonds Summer assizes for the murder of Maria Marten, whose body was discovered in a barn twelve months after her disappearance. He alleged that she had committed suicide, but upon examination of the body a handkerchief was found drawn tightly around the neck; the course of a pistol ball was traced through the left cheek passing out at the right orbit; and three other wounds were found, one of which had entered the heart, and all of which had been made by a sharp instrument, means of death so various and unusual with females as to discredit entirely the statement of the prisoner, and lead to his conviction and execution.²

It is important to inquire, in cases where the defence of suicide may be started, whether there are marks upon the person other than those made by the fatal wounds; e. g., whether the hands or arms have the appearance of having been held forcibly during the commission of the deed, whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame, whether the wound is in a position that could not have been reached by the deceased, and which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound. It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, where on the floor the presence of another person in that room was clearly demonstrated by the print of a bloody left hand on the left arm of the deceased.³

(3.) *Whether the wounds, if given by another, are to be considered as the result of a momentary passionate impulse, or of premeditation.* In this, as in the question just considered, the position of the wound is of consequence. When found inflicted in a concealed part, such as a superficial observer would not be likely to notice, the inference of intent is strong.⁴ A person acting under the impulse of passion would be likely to inflict a less skilful wound than one whose act was the result of premeditation. Thus, as in one or two Western cases, where the deceased is found with his eyes gouged out, there is little difficulty in deducing the intent. And so in a case where an infant was found with a needle thrust upwards through its navel.

The direction of the wound may also be an important circumstance to show the intent, as in a case stated by Watson, where the prisoner was tried for shooting a man who came to his house under suspicious circumstances. The defence was that the ground being rough and slippery, the prisoner stumbled, and both barrels of the gun had gone off by accident. This statement was confirmed by tracing the direction of the shot in the body of the deceased, which was found to be pointed upwards.⁵

¹ Taylor's Med. Juris. 257.

² Wills on Circum. Evid. p. 169, 170.

³ Case of Mary Norkot and others, 14 Ho. St. Tr. 1324.

⁴ Dean's Med. Juris. 258; see ante, p. 321.

⁵ Watson on Homicide, 246.

2d. Presumptions drawn from instrument of death.

The nature of the weapon used, as has already been observed, is in a great majority of cases to be deduced from the wound itself. Thus, a stab or cut would indicate the employment of a sharp instrument, while its length, shape, and direction would point to the species of the particular weapon, whether it was a common clasp knife, a dirk, an axe, or a razor. Frequently, also, the weapon may be discovered near to, or in the vicinity of the body; and although this is often considered a circumstantial indication of suicide, it is by no means invariably found to be so. In July, 1683, the Earl of Essex was found dead in the Tower, with his throat cut, and a razor lying near him. His throat was smoothly and evenly cut from one side to the other, and entirely down to the vertebral column. Notwithstanding this, the razor was found to be much notched on the edge. This fact, those who favoured the view of suicide were asked to explain. They could do so no other way than by supposing that the deceased had notched the razor by drawing it backwards and forwards on the neck bone. This he could hardly be deemed competent to do after all the great vessels of the neck had been divided.¹ If the weapon be found in the vicinity of the corpse, the question arises whether it could have been placed in its position by the act of the deceased. In the case of Courvoisier, who was tried for the murder of Lord William Russell, there were two facts relied upon to show that this was not a case of suicide. One was that a napkin was placed over the face of the deceased, and the other that the instrument of death did not lie near the body.² To the same point is the case of Jane Norkott, who was found dead in her bed with her throat cut, while a bloody knife was found sticking in the floor a good distance from the bed, but as it stuck, the point was turned toward the bed and the haft from it.³ It may be that the weapon found near the person of the deceased is not the one with which the crime has been committed. Thus, in an old case, the deceased was found with his own pistol lying near him, from which circumstance, together with that of no person having been seen to enter or leave the house, it was concluded that he had destroyed himself; but on examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol.⁴ If, however, the instrument of death has been found, and homicide is suspected, the inquiry becomes important, to whom does it belong? In order to ascertain the ownership it will be necessary to examine the weapon itself carefully for any name or other mark by which it may be identified, and to inquire who possessed such a weapon; whether any one purchased or procured one of the kind a short time before the murder was committed; whether any one was observed preparing it for use; whether there are any marks upon it to indicate the hand, or the size of the hand in which it was held, or the direction in which the fatal blow was given; whether the weapon is imperfect or broken, and if so, who

¹ Dean's Med. Juris. 257; Taylor's Med. Juris. 262; 2 Beck's Med. Juris. 82—84.

² Dean's Med. Juris. 256; Guy's For. Med. 480; Taylor's Med. Juris. 262.

³ 2 Beck, 86, 87; Guy's For. Med. 480; Dean's Med. Juris. 257.

⁴ Wills on Circum. Evid. 80; Dean's Med. Juris. 256.

has been observed in possession of a fragment corresponding to the broken portion. Thus, in a trial in Philadelphia, in 1845, the prisoner's agency was determined by the fact that the profile of a notched hatchet with which the homicide was committed, was found pencilled in blood on his handkerchief, with which the hatchet probably had been wiped. So, when the death was produced by a dirk knife, the possession of such a knife was traced to the prisoner on the day of the homicide, and on the next morning, the handle of a knife with a small portion of the blade remaining, was found in an open cellar near the spot. Afterwards upon a post mortem examination of the deceased, the blade of a knife was found broken in his heart. Some of the witnesses testified to the identity of the handle as that of the knife previously in possession of the accused, but there was no evidence to the identity of the blade. The question remained, therefore, whether the blade belonged to the handle, and when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other, that no person could doubt that they had belonged together, because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match.¹ An instance of a somewhat similar character is mentioned of a trial before Lord Eldon of murder with a pistol. The surgeon had stated in his testimony, that the pistol must have been fired near the body, because the body was blackened, and the wad was found in the wound. It being asked by the judge if he had preserved that wad, he said that he had, but had not examined it; on being requested so to do, he unrolled it carefully, and on examination, it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad, as shown by the texture of the paper and purport and form of stanzas of the two portions, was found in the pocket of the accused, and tended to fix him as the person who loaded the pistol.²

*3d. Presumptions drawn from poison.*³

In the case of death by poisoning, says Mr. Greenleaf,⁴ "it is not necessary to prove the particular substance or kind of poison used; nor to give direct and positive proof what is the quantity which would destroy life;⁵ nor is it necessary to prove that such a quantity

¹ Bemis' Webster's case, p. 466.

² Ibid.

³ On this point the following authorities may be consulted: Mittermaier, Deutsch. Straf. s. 124; Henke, Lehrb. s. 627; Meckel, Lehrb. s. 145; Ann. d'Hygiene et de Med. Leg. Juellet, 1830, p. 365; Devergie Med. Leg. i. p. 445; Wildberg, Rhapsodien aus der gerichtl.; Arzneiwissenschaft, No. 8; Foderé Med. Leg. iii. p. 449; Beck's Elements. ii. p. 573; Briand et Bresson Med. Leg. p. 350; Eggert. der gewaltsaml Tod. p. 335; Wurzur, Beitrag zur Lehre vom Giftmord Marburg, 1835; Orfila, vol. xvii. p. 5; Lafarge case, Raspail, Paris, 1840, &c.; Barse Manuel, Paris, 1845; Gengler, die verb. der Vergiftung ii. p. 25; Barzellotti, questioni di Medicina Legale (Bianchi's edition) p. 330; Puccinotti Med. Leg. p. 195—255; Thomson, p. 477; Guy, For. Med. pt. iii.; Dean's Med. Juris. p. 286—412; Taylor, Med. Juris. p. 5—161.

⁴ 3 Greenleaf on Ev. s. 135.

⁵ The observations of Mr. Lofft, on the testimony of men of science, are worthy of profound attention. "In general," he says, "it may be taken, that when testimonies of professional men of just estimation are affirmative, they may be safely credited; but when negative, they do not amount to a disproof of a charge otherwise established by various and independent circumstances. Thus, on the view of a body after death, on

was found in the body of the deceased. It is sufficient, if the jury are satisfied from all the circumstances, and beyond reasonable doubt, that the death was caused by poison administered by the prisoner.¹ Upon the latter point the material questions are, whether the prisoner had any motive to poison the deceased—whether he had the opportunity of administering poison—and whether he had poison in his possession, or power to administer. To these inquiries, every part of the prisoner's conduct and language in relation to the subject are material parts of the *res gestæ*, and are admissible in evidence.² But it is not necessary to prove that the poison was administered by the prisoner's own hand; for if with intent to destroy the deceased, he prepares poison and lays it in his way, and he accordingly takes it and dies; or if he gives it to an innocent third person, to be administered to the deceased as a medicine, which is done, and it kills him; this evidence will support a charge against the prisoner as the murderer.³ So, where a third person, who was directed by the prisoner to administer the dose, omitted to do so, and afterwards the poison was accidentally administered by a child, and death ensued; this was held sufficient to support an indictment against the prisoner as the sole and immediate agent in the murder.⁴

In inquiries falling under this head, great caution is necessary; and the first step is to secure the most skilful professional aid. In the German practice, the prosecuting officer, at the moment of suspicion, is required to enlist the co-operation of good chemists, whenever a chemical analysis is necessary;⁵ and for the pathological diagnosis, a professed forensic physician.⁶

The inquiry, which should not be abandoned merely on the strength of the declaration of the physician attending during the last illness of the deceased that no poison was administered,⁷ is threefold. 1. To

suspicion of poison, a physician may see cause for not positively pronouncing that the party died by poison; yet if the party charged be interested in the death; if he appears to have some preparation of poisons, without any probable just motive, and this secretly; if it be in evidence that he has in other instances brought the life of the deceased into hazard; if deceased has discovered an expectation of the fatal event; if that event has taken place suddenly, and without previous circumstances of ill health; if he has endeavoured to stifle inquiry by precipitately burying the body, and afterwards, on inspection, signs agreeing with poison are observed—though such as medical men will not positively affirm could not have been owing to any other cause—the accumulative strength of circumstantial evidence may be such as to warrant conviction; since more cannot be required than that the charge should be rendered highly credible, from a variety of detached points of proof; and that, supposing poison to have been employed, stronger demonstration could not reasonably be expected to have been, under all circumstances, producible. 1 Gilb. on Evid., by Lofft, p. 302.

¹ *R. v. Sawwell*, cited in *Wills on Circum. Evid.* 180, 181. Statements made by the deceased, a short time previous to the alleged poisoning, are admissible to prove the state of his health at that time. *R. v. Johnson*, 2 C. & K. 354.

² See the observations of Buller, J., in *Donnellan's case*; and of Abbott, J., in *R. v. Donnell*; and of Rolf, B., in *R. v. Graham*; and of Parke, B., in *R. v. Tanell*, cited in *Wells on Circum. Evid.* 187—191; *R. v. Geering*, 18 Law Journ. 215.

³ *J. Kely*, 52, 53; *Foster*, 399; 1 Hale, P. C. 616; *R. v. Nicholson*, 1 East, P. C. 346.

⁴ *R. v. Michael*, 9 C. & P. 356.

⁵ *Preuss. Crim. Ordu.* s. 167; *Baier, Crim. Ordu.* s. 78; *Wurt. St. P. O.* s. 108; *Bad. St. P. O.* s. 107. For the analysis and references of this head, I am indebted to Mittermaier, *Deut. St.* s. 124.

⁶ On the proper choice of chemical aid, see *Barzellotti*, c. i. p. 333; and *Barse Manuel*, p. 135.

⁷ *Pfister, Criminalfalle*, ii. p. 92.

discover the corpse of the deceased, and to ascertain by inspection and by chemical analysis, whether a poisonous substance or traces of the introduction of it are to be found upon the body.¹ 2. To examine the vessels and dishes found near the deceased, of which he made use,² the substances he partook of during his illness, and those vomited or ejected,³ with a view to the detection of traces of the poison. 3. To ascertain carefully the symptoms of disease and death,⁴ in order to ascertain whether the phenomena attending these, are such as are commonly produced during the disease, at death, or subsequently, by the application of poisons in general, or of some particular kind.⁵ It must, however, be borne in mind, that many of the symptoms usually produced by poisons cannot, with certainty, be considered conclusive proof of death by their use, since they are often the result of other diseases, as cholera, inflammation of the stomach, &c.,⁶ and it therefore becomes a duty to inquire whether the case is not one of this description.⁷

As several kinds of poisons produce the same symptoms, it will be sufficient for the physician to pronounce the existence of a poison belonging to a certain *class*, if he is unable to specify the particular kind employed.⁸

In order to an exact discovery of the symptoms as they occurred, it is essential that there should be an examination of the inmates of the house, particularly those who nursed the deceased, or were near him in his illness, while the attending physician should be called upon for an accurate report of the progress of the disease; and as the importance of many questions to be asked on this point can only be clear to a physician, it is important at the outset to obtain medical counsel, not only as to the direct point of poisoning, but as to the state of health of parties in the same family. This is particularly important in those cases where the same symptoms shown by the deceased, are either felt or feigned by others.⁹

In conducting the chemical analysis it will be necessary, 1. In exhuming the body, supposing it to have been already buried, to preserve portions of the soil in which it was laid, and of the earth immediately adjoining the body, that they be analyzed, since recent observations show that the soil is often impregnated with arsenic.¹⁰ 2. To preserve the specimens to be analyzed, in such a manner as to protect them from all influences calculated to produce deception, or lest poison be introduced into them by accident or artifice. 3. In transmitting them to the hands of adepts, to reserve a portion, which

¹ See note to Feuerbach Lehrb. s. 222; Helie Theorie de Code Penal, v. p. 334—341; Barse Manuel, p. 234; Friedreich Handb. s. 1042; Gengler Verbi. der Vergiftun, ii. p. 18; Pacinotti, p. 200; Richter; Strafrechtspflegl, i. p. 66.

² Beck, p. 590.

³ Meckel, s. 158; Eggert, i. p. 316.

⁴ Pfister Criminalfalle, iv. p. 197; Friedreich, p. 1056; Meckel Lehr. s. 148; Henke Lehr. s. 643.

⁵ Mittermaier, Deut. St. s. 124; Friedreich, p. 1069.

⁶ Friedreich, p. 1095; Gengle, ii. p. 30; Thomson, p. 419; Taylor, Med. Juris. p. 41; Puccinotti, p. 217.

⁷ Hitzig Zeitschrift, 1827, vol. i. p. 1—162.

⁸ Hitzig Zeitschrift, No. 18, p. 402; No. 20, p. 461; No. 21, p. 208.

⁹ Mittermaier, Deut. St. s. 124.

¹⁰ Devergie in the Annales d'Hygiene, No. 47, p. 165; Raspail, Memoire, p. 69.

may be wanted for a subsequent analysis;¹ and to insure a careful transportation,² so that they reach the medical examiner without amalgamation, with unbroken seal, and corresponding with the specimen to be given in the trial.³

With regard to the discovery of poison in the body, late researches have shown that many supposed indications of the presence of arsenic, as, for instance, obstructed decomposition,⁴ are not reliable, but afford some probability, if carefully examined.⁵

In applying the veneficial test,⁶ the present European practice is to analyze not only the substances found within and those ejected from the stomach, but also all the other parts of the body; this particularity resulting from the discovery that poisons, especially mineral ones, may also find their way into the so called secondary courses of the body, and be there detected. Recent investigations, also, have shown it practicable,⁷ by means of the hydrogen contained in arsenic, and the brown spots produced by igniting the gas, to determine the presence of the poison. In estimating the value of this test, it must be remembered, 1. That everything depends upon the observation of the highest degree of exactness. 2dly. That the infusions used by the chemists are often themselves impure. 3dly. That poison may have been introduced into the body by the medicines taken during the disease, which medicines should therefore be carefully examined;⁸ or introduced by other circumstances, as, for instance, the soil in which the corpse was laid,⁹ since it has been shown that poison may be introduced into the body even after death.¹⁰ 4thly. That the brown spots produced by the operation just mentioned, are liable to be confounded with similar ones produced by antimony or other substances contained in the objects examined.¹¹

An exact report of the chemical analysis, and of all the proceedings of the professional examiners, is necessary by the European practice,¹² and such a report, it cannot be too strongly urged, should in this country also be exacted. The report should be directed to the existence of the poison, its quality and quantity,¹³ the objects in which it was discovered, whether in the stomach, in the evacuations, or in the food or medicines used; and the probability of its having been the cause of death. The fact of the homicide having been com-

¹ Barse, Manuel, p. 161.

² Errors in the Laffarge case, Raspail, p. 16.

³ Errors in the Laffarge case, p. 50.

⁴ Feuerbach, Interesting Cases, i. p. 8; Eggert, p. 346; Bopp. Crim. Beitrage, i. p. 8.

⁵ Burdach, p. 83; Friedreich, p. 1107.

⁶ Henke Lehrb. s. 654—673; Meckel, Lehrb. s. 176—196; Huenfeld die Chemie der Rechtsflege, Berlin, 1832; Thomson, p. 502; Friedreich, Handb. p. 1124; Devergie, iii. p. 481.

⁷ Marsh in Edinburgh Journal, Oct, 1836, cited in Annalen der Pharmacie, vol. 63, p. 702; Berzelius in Poggendorf's Annalen, vol. 42, p. 159; and Annalen der Staatsarzneik, by Schneider, vol. iv. No. 3, p. 133; Thomson, p. 551—553; Friedreich Handl. p. 1146; Devergie, iii. p. 412—500; Visini, Beitrag. zur criminal rechtswissenschaft, iv. p. 133; Taylor, p. 150, 152, 155; Guy, p. 158; Devergie in the Annales d'Hygiene Legale, 1840, No. 47, p. 141.

⁸ Devergie in the Annales, No. 47, p. 176.

⁹ Devergie, p. 163.

¹⁰ Puccinotti, p. 248.

¹¹ Raspail, Memoire, p. 111; Friedreich Central Archiv. vol. i. p. 712; Vol. ii. p. 235; Guy's For. Med. p. 460.

¹² Mittermaier, s. 124, &c.

¹³ Meckel Lehrb. p. 157, note; Pfister Criminalfalle, ii. p. 112.

mitted by poison, must be determined by the considerations, 1. That the failure to discover a poisonous substance in the body, does not establish the non-administration of the poison. 2. That on the other hand the presence of poisons in the food and other substances examined, affords no proof of the commission of the crime, since there is no certainty that the poison actually entered the body. 3. That even if the application of poison be established, it does not conclusively demonstrate that the patient died of the poison.¹ 4. In the case of poisons that leave no trace in the body, and are not to be detected by chemistry, it becomes necessary to ascertain the symptoms of disease and death, and the condition of the corpse, with the utmost precision. In the case of Castaing, Orfila declared that he could not determine whether the death of Auguste Ballet had been produced by natural causes or by vegetable poisons. "The *corpus delicti* is wanting, because the matter vomited is not forthcoming. If that matter had been submitted to me, as well as the liquid contained in the stomach, I could have given the most satisfactory proofs. Two or three years ago it was a common error to suppose that certain vegetable poisons left no trace, exclusive of any other symptom of disease—that was even an axiom of legal medicine. At present, chemistry has made great progress, and it is almost as easy to discover vestiges of vegetable as of mineral poisons."²

To constitute a case on which a conviction can safely rest, it is important to show that a poison has been discovered in the body;³ and this is carried so far in England and this country, that it would have been difficult to have secured conviction for murder by poison, unless the presence of the poison was chemically ascertained, although it was not absolutely required that it be found in the body, though a case of conviction occurred in Scotland, where a servant girl had mixed some poisonous matter with gravy, and Dr. Christison was led to suppose that poison had been swallowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce; though he said that this probability was strengthened by the fact that the violence of the symptoms was in proportion to the quantities of the suspected food taken.⁴ More recently Taylor lays down the principle, that while the chemical investigation should never be omitted, yet the detection of poison in the body by means of the chemical analysis is not essential, but the offence will be sufficiently proved, if established by the concurrent evidence of the symptoms of the disease, the marks upon the body after death, and other similar inferential testimony.⁵ Guy lays peculiar stress upon chemical investigations, and discovery of poison, if corroborated by other proofs derived from symptoms and marks upon the body.⁶ Puccinotti places no reliance on the pathological observations, and on the chemical ones only when all the conditions above cited are fulfilled.⁷ The inference of poisoning is much strengthened where

¹ Puccinotti, p. 250; Devergie, iii. p. 708; Mittermaier, Deut. St. s. 124.

² Celebrated Trials, p. 110.

³ Devergie, *Medicine Legale*, i. 447; Hele, *Theorie du Code Penal*, vol. v. 341.

⁴ Wills' *Circum. Evid.* 180; see 33 Am. Jur. 1.

⁵ Taylor. 159.

⁶ Guy's *For. Med.* iii. 404—407.

⁷ Puccinotti, 222, 253.

the analysis has brought to light traces from which the inference of poison in the body may be drawn, unaccompanied by any possibility of its introduction after death;¹ where the symptoms of disease and death concur in establishing the death by poison; and where every doubt has been removed which might arise from the observation that the symptoms noticed were the results of other diseases, or that the poison detected by the analysis entered the body in another manner.²

In cases of poisoning it becomes important to inquire, in seeking for the probable criminal, whether any party in the range of suspicion procured poison, particularly of the kind which probably proved fatal, shortly before the death of the deceased; whether such person was acquainted with the preparation of poisons; whether he forced himself into contact with the deceased, or out of the sphere of his usual duties or habits, tried to administer meat or drink to the deceased. It may, under such circumstances, be important to go far back for the purpose of discovering who prepared the meats or had access to the dishes, and such evidence is clearly admissible.³ There are many cases where it may not be out of place to inquire whether any members of the deceased's family were observed unaccountably to abstain from the dishes previously poisoned, particularly if it belonged to the usual meal of the family, or was a favourite dish of the deceased; whether there was any attempt to prevent others from partaking of them, or to induce the deceased from abstaining from them; and very particularly, whether there was any effort to prevent a post mortem examination, or to hide or destroy any remaining portions of the food or drink of which the deceased partook, or any of the vessels containing them; or whether there was an effort to throw unreasonable obstacles in the way of the employment of a competent physician during the illness of the deceased. It is to be observed, in concluding this subject, that the more nearly the poison found in the body corresponds with that purchased or prepared by the prisoner, the more vivid does the suspicion become.⁴

4th. *Presumptions drawn from materials appropriate to be converted into instruments of crime.*

At the earliest moment the situation and expression of the deceased should be ascertained and noted as marks of anguish, of hurry, of disturbance, besides marks of violence, may all tend to so elucidate the question of suicide or homicide; and though our own method of trial would not make it just or decent to imitate the German practice of making a cast of the deceased's face, yet experience teaches us that the safety of human life requires that no details connected with the appearance of the body and countenance, when discovered, should be omitted. Thus, Mr. Amos, in his lectures,⁵ tells us of a trial where

¹ Barse Manuel, 265.

² Friedreich, 1186; Barse Manuel, 167; Orfila in Friedreich's Central Archiv. vol. ii. 495; Taylor, 141.

³ See ante, p. 276, et seq.

⁴ 2 Mittermaier, Deut. St. § 124, ante, p. 295.

⁵ 8 London Med. Gazette, 578.

"There are many ancient testimonies," says Mr. Amos, (Great Oyer, 347,) "to the existence of slow poisons, producing their fatal effects after intervals of weeks or months,

the hypothesis of suicide was defeated by the fact, that while the united result of medical experience is that prussic acid produces *instantaneous* death, the deceased was found with a *corked* bottle in her hand, from which five drachms had been taken, and with the bed clothes composed about her person with elaborate precision.

Many points of inquiry under this head have been suggested by a previous chapter, in which the presumptions drawn from extrinsic mechanical indications are considered.¹ Indications of such a character are always admissible, and the facts from which they are to be drawn should be carefully scrutinized by counsel, whether charged with the prosecution or defence of a supposed criminal. Of these familiar illustrations, are leaves from which poison could be concocted, drugs peculiarly or exclusively suited for the purpose of adulterating food, &c., or receptacles enclosing any thing of the kind, materials for preparing weapons, &c. It is to be inquired in such cases, for what use the accused was in the habit of making these materials, and whether he was familiar or acquainted with the criminal purposes to which they might be made subservient. Under this head also would properly be considered the purchase of poisons under the pretence of employing them for the destruction of vermin, and the question would naturally arise, were they so employed? A female convicted at the Warwick summer assizes, August, 1821, of the murder of her uncle by poison, alleged that she had bought arsenic to poison mice, and pointed to a mouse which she said had been killed by it, whereas it was found that the mouse had not died from poison.² Mr. Wills re-

as Plutarch, Theophrastus, Livy, Tacitus, and Aulus Gellius. In more modern times, the like powers have been attributed to the *Aqua Tophana*, and the *Succession Powder*. In 1659, the detection of a society of women at Rome, who had associated themselves for the purpose of poisoning, created great alarm. In the year 1670, the Marchioness Brinvilliers, who, among other victims, poisoned her own father and two brothers, created a like sensation in France. An Inquisition, called the *Chambre Ardente*, was established at Paris, for the purpose of watching the use of poison. By means of this institution, two women, who dealt largely in poisons, La Vagren and La Voison, were detected in 1680, and burnt alive.

The most famous poisoner of modern times, was a woman at Naples, by the name of Tophana, the inventress of the *Aqua Tophana*, which was administered in drops, proportioned to kill within any particular time that might be required. This woman, who fled from Naples in 1709, was visited as a curiosity at an asylum, 1730. She is stated to have poisoned upwards of six hundred persons.

These celebrated adepts at poisoning became famous after the time of Somerset's trial; but shortly before that period, Shakspeare's writings show the general notion in England, of the efficacy of slow poisons:

‘Their great guilt,
Like poison given to work a great time after,
Now ‘gins to bite the spirits.’

Tempest, Act III., sc. 3.

And the stories current in the reign of James I., of Catharine de Medicis, and of her perfumer, René, who had obtained the reputation of being able to convey poisons through a variety of vehicles, as a jelly, or the smell of a rose, had probably possessed the minds of the Peers who tried Somerset, with a belief that slow poisoning was a craft, which was taught and practised.

In the present day, it may be doubted if a medical man could indicate with certainty any poisonous preparation of which the effect should be fatal, but should, nevertheless, be suspended for two months, or even a week. And, perhaps, good scientific testimony could be produced, negating the quality of being a slow poison, to any of Franklin's drugs, unless indeed they be repeated in small doses for a considerable period of time.”

¹ See ante, p. 279, 280, &c.

² R. v. Mary Ann Higgins, London Med. Gaz., vol. ix. 896; Ann. Register, 1831.

marks, that "possession of the instruments or means of crime, under circumstances of suspicion—as of poison, coining instruments, combustible matters, picklock keys, dark lanterns, or other destructive or criminal weapons, instruments or materials, and many other acts of apparent preparation for the commission of an offence, are important facts in the judicial investigation of crime, though bare possession, or other mere acts of preparation, without more conclusive evidence, are not in themselves of great weight."¹

5th. *Presumptions drawn from detached circumjacent bodies.*

It is important in this relation to consider,—1, The position of the deceased; 2, Traces of blood; and 3, Liability of the deceased to attack. With reference to the first of these points, the *position of the deceased* and the appearance of the floor or bed on which a person murdered is found, it is to be inquired whether any peculiarity in the position of the body determines the homicide to be the act of another, as in the case just cited: whether the hands or feet are tied; whether the floor, the bed, or the ground, present the appearance of a recent scuffle; what footsteps are noticed leading to or from the *locus in quo*, together with their dimensions and other peculiarities which should be carefully and immediately noted.² 2. *Traces of blood* near the corpse or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries: 1. Were the wounds self-inflicted, or the act of another? This may in some cases be determined by observing that blood is visible in spots or pools in places where it could not have been if the death had been the result of suicide; or that there is no communication between the blood on the floor and the corpse; as if the body had been removed by another from the spot on which the deed was committed.³ (2.) Was the deceased erect or lying down when the wounds were received? It will throw much light on this question if the spots of blood on the adjoining wall, or any other erect body near the locality be examined, as the direction from which they came may frequently be determined from the manner in which they have spattered. Prints of bloody hands may frequently be observed, and impressions of bloody feet, which give information as to the direction taken by the murderer after the commission of the act. Care should be taken, however, not to create *indicia* while searching for them.⁴ A young man in France was found dead in his bed, with three wounds in the front of his neck. The physician, who was first called to see him, had unknowingly stamped in the blood with which the floor was deluged, and had then walked into an adjoining room, passing and repassing several times. The consequence of this was that suspicion was raised against a party, who narrowly escaped being committed to take his trial for murder. It subsequently turned out to be a clear case of suicide.⁵ The examination of spots supposed to be blood upon the person and clothes of

¹ Wills on Circum. Ev. 46; see ante, p. 318.

² Burnett's Crim. Law of Scotland, Trial of Richardson, p. 524.

³ State Trials, vol. xiv. p. 1324; Beck's Med. Juris. p. 548.

⁴ Beck's Med. Juris. 786.

⁵ Taylor's Med. Juris. vol. i. p. 372.

the suspected party is always of the greatest importance, for although this is generally attempted to be explained away by attributing it to an accidental cut or bleeding at the nose, such excuses are commonly easy to disprove if it be satisfactorily ascertained that the spots are caused by blood. On this subject the evidence of Dr. Wyman, in the Webster case, already referred to, is entitled to much weight.¹

6th. Presumptions drawn from liability to attack.

This may arise from three different causes, 1st. The possession of money or valuable articles. 2d. An old grudge, or other cause, such as a previous quarrel; and 3d. Jealousy. In the first of these cases the question should be asked, was the fact that the deceased was in the possession of money, particularly if the amount be considerable, known to any one; and if so, to whom; was the money found on the corpse or was it

¹ "When blood exists, in large quantities, upon furniture, clothing, &c., a general inspection, with the aid of chemistry, will determine its presence with sufficient accuracy. It is, however, not unfrequently found in too small quantities for chemical analysis; and it has happened that the statement of a police-officer, or other non-professional spectator, has been admitted as evidence that the stains in question were those of blood, when the bare announcement by a physician even, should be taken with the greatest caution. There are abundant instances, in the treatises on medical jurisprudence, of unfounded charges and unjustifiable arrests having been made, in consequence of an error at the outset, as to the true nature of stains assumed to be blood. It is, therefore, in the highest degree important that examinations should be conducted with the greatest care, and that another sign than colour (which has been abundantly proved to be fallacious) should be obtained.

"Recently drawn blood, when placed under the microscope, is at once recognised by the presence of a vast number of flattened discs, (commonly, though inaccurately designated as 'blood globules,') of a red colour, with a single central spot, interspersed among which may be seen, in far lesser numbers compared with the discs themselves, rounded, colourless globules, containing each three or four central granules. These last are known to physiologists as 'lymph corpuscles,' or 'lymph globules,' proper. If a drop of blood be dried on a piece of glass, painted wood, or other surface, and a small portion (a thin scale, scraped off with a knife, is the most desirable form) be placed under the microscope, and water added to it, it soon becomes softened, very slightly tinged the water around it with a pale reddish colour, and becomes more or less transparent, according to its thickness. After a careful inspection, the observer will seldom be able to find any traces of blood-discs, but transparent, colourless spots will be seen scattered through the mass, which, with a high power, (say 800 diameters,) may be seen to have a globular form, and to contain granules—usually three or four. These are the lymph corpuscles. If a drop of blood be rubbed on a piece of glass, as, by drawing a bloody finger across it, so that the discs are deposited in a single layer, and then allowed to dry, they are readily recognised even in the dried state; but when allowed to dry in masses, I have failed to determine their presence. The lymph globules, on the contrary, may be softened out after they have been dried for months, and their characteristic marks readily obtained. I have examined blood which has been dried for six months, and have found it easy to detect them. It is not improbable that they may be detected after the lapse of years, if the blood shall have been preserved dry, so as to prevent decomposition.

"The evidence that the stains on the pantaloons and slippers of Professor Webster, were of blood, was derived wholly from the microscope. And the presence of the lymph-corpuscles, combined with the colour, and other and less characteristic microscopic appearances of the blood, was the basis of the opinion given at the trial.

"While the presence of lymph-corpuscles, combined with the ordinary and more obvious appearances of blood, is regarded as the diagnostic sign of blood, yet it should never be lost sight of, that it does not give an absolute sign that the blood is never of the human body. The blood of some animals so closely resembles that of man, in its microscopic characters, that, as yet, no positive means exist by which they may be distinguished. The opinion that a stain of blood in question is human, or animal, must rest upon improbabilities." (Statement by Professor Wyman, reported in Bemis' Webster case, pp. 21, 22.)

missing; is there evidence that any suspected party, suddenly and from an unexplained cause, became possessed of a large sum; paid long standing and pressing debts of considerable amounts, or remarkably increased his expenditures? Pedlers, especially itinerant venders of jewelry and other valuable articles, are from this cause rendered peculiarly liable to attack, and it is of importance to inquire in cases of this description, who was last seen in company with the deceased, or with any of the articles known to have been in his possession.¹

Where the absence of other motive makes it probable that the cause was an old grudge, or of jealousy, the inquiry then arises, with whom the deceased has had a recent or violent quarrel, or who from any other relation or action of the deceased toward him would probably be tempted to seek the death of his real or supposed enemy; and who has harboured feelings of jealousy, or who has had cause to harbour such feelings. In connection with this, evidence is always admissible, of threats and declaration; and it is expedient, therefore, to consider who has used such declarations, and what has been their character.

In England and this country, "jealousy" is a motive which, in cases of homicide, is but rare, when compared with those arising from the relation of debtor and creditor. When a homicide takes place, where this class of motives may be supposed to have operated, it is necessary to inquire whether there were any debtors of the deceased, in sums which they were unable to pay; and whether their dealings with their creditor had been marked with such urgency on his part, and embarrassment on theirs, as to make his death an object to them of relief. Mr. Attorney General Clifford, in his speech in the Webster case, says in illustration, "Take the case of Colt in New York, for the murder of Adams; there was an indebtedness, and the victim was beguiled by an appointment into the place of business of his murderer, and slain for the debt; or the case in New Jersey, of Robinson, who killed his creditor, Mr. Suydam, and concealed his remains in his cellar, and who by a strange concurrence of circumstances was detected, tried and convicted, and then confessed and was executed, is another instance."²

The Webster trial itself furnishes many suggestions which, in this class of cases, should be pursued. Was the defendant at the time desperately insolvent? Was his social position such as to make *appearances* of great moment; and had he been in the habit of playing at heavy odds to keep them up? Were the evidences of debt of such a character as if carried on the person could have been easily destroyed; and was there any attempt to induce the deceased to bring them with him to the spot appointed for the interview? What, in other words, were the probabilities of the debt being cancelled by the death; for upon this the question of *intention* would depend? Should it be shown that the debt was one of record, the presumption would be much more in favour of manslaughter, arising from sudden irritability on being pressed with the debt, than it would be should it appear that the deceased had the sole evidences of debt on his person; that he had been invited to bring them, and that they were afterwards destroyed. All this is evidence, and so are those circumstances from which a coun-

¹ Wills on Circum. Ev. 237—243.

² Bemis' Webster case, 421.

tervailing presumption could be drawn, such as the fact that the deceased had independent securities for the debt, on which the defendant was liable, or that the defendant's circumstances were not such as to render the discharge of the debt of paramount importance.

7th. Presumptions in infanticide.

To support an indictment for infanticide, at common law, says Mr. Greenleaf,¹ "it must be clearly proved that the child was wholly born, and was born alive, having an independent circulation and existence." Its having breathed is not sufficient to make the killing amount to murder; as it might have breathed before it was entirely born;² nor is it essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time afterwards;³ neither is it material that it is still connected with the mother by the umbilical cord, if it be wholly brought forth, and have an independent circulation.⁴ But in all cases of this class, it must be remembered, that stronger evidence of intentional violence will be required than in other cases; it being established by experience, that in case of illegitimate birth, the mother, in the agonies of pain or despair, or in the paroxysm of temporary insanity, is sometimes the cause of the death of her offspring, without any intention of committing such a crime; and that therefore mere appearances of violence on the child's body are not sufficient to establish her guilt, unless there be proof of circumstances, showing that the violence was intentionally committed, or the marks are of such a kind as of themselves to indicate intentional murder.⁵

1. Condition of the body of the child.

Where a woman is accused of infanticide, or confesses to have given birth to a child, the first duty is to make search for the dead body of the infant, and if this be discovered under circumstances calculated to excite suspicion, then to resolve all questions of place and surrounding locality, and examine the body with particular reference to 1, the condition in which it is found; 2, the degree of maturity of the child; 3, the length of time it remained alive after birth; 4, how long since its birth took place; 5, the lapse of time since death; 6, the question of its having been born alive; 7, with adequate powers of vitality; and 8, the symptoms by which the death may be accounted for.⁶

¹ 3 Green. on Ev., 137.

² R. v. Enoch, 5 C. C. P. 539; R. v. Poulton, Id. 329.

³ R. v. Brain, C. C. & P. 349.

⁴ R. v. Reeves, 9 C. C. P. 25; R. v. Crutchley, 7 C. C. P. 754; Wills on Cir. Evid. p. 204; Regina v. Trillbe, 2 Mood. C. C. 260; 1 C. & M. 650. If the child be intentionally mortally injured before it is born, but is born alive, and afterwards dies of that injury, it is murder, 3 Inst. 50; 1 Russ. on Crimes, 485; R. v. Senior, 1 Mood. Cr. Cas. 346; 4 Com. Dig. Justices, M. 2, p. 449, ante, 93..

⁵ Allison's Prin. Crim. Law, p. 158, 159; Wills on Cir. Evid., p. 206, 207.

⁶ On this head Mittermaier refers to the following works:—Guy's For. Med. p. 118; Dean's Med. Juris. p. 123, 198; Taylor's Med. Juris. p. 435; Buettner, Vollstaend, Kenntniss, wie durch anzustellende, Besichtigung, &c., Konigsberg, 1771; Camper, Frankfort, 1777, (Translated by Herbell;) Vater, Vit. 1735; Jaeger, Tub. 1780; Hutcheson, London, 1820; Capuron Med. Leg. relative a l'Art des Accouchements, Paris, 1821; Med. Leg. ou Considerations sur l'Infanticide, &c., par Lecieux, Renard Laisne, Paris, 1819; Mons. diss. Med. Leg. on Infanticide, Lovan. 1822; Gans, von dem Verbrechen

On the first head, the external formation of the parts, the degree of maturity at birth,¹ the organs, the length and weight of the child, should at once be determined with the greatest accuracy, although in these cases also, particularly in reference to the point last mentioned,² experience has demonstrated the impossibility of establishing a universal standard.

With reference to the question whether or not the child was born alive, which, as will be seen, is one of decisive importance in determining the grade of the offence,³ if life is not proved by the confession of the mother, or the testimony of witnesses, recourse is to be had to certain tests⁴ applied to the lungs, the organs of digestion, the liver, and the bladder. It is, however, to be observed that great caution is necessary in receiving the testimony afforded by the confession of the mother. In one case, under the editor's observation, the mother in the agony of remorse, thought that she had observed the child move, and so declared, when it was indisputably shown that the child was dead before birth.⁵ The test by the bladder rests upon the assumption that a discharge of urine cannot take place without the action of the lungs.⁶ The test by suggillation proceeds on the supposition that a continued circulation of the blood is necessary to any congestion.⁷ Although these tests furnish but probabilities, no trial for infanticide should be suffered to take place until they are all scrupulously applied. The test by the lungs, in particular, is indispensable; and here again a distinction is to be drawn between, 1. The hydrostatic test (by floating.) 2. The hemorrhhal test of Plouquet, which has regard to the relative weight of the lungs to the whole body, and the alteration produced in that relation by the act of breathing, as, one to fifty-five where the lungs have inhaled, and as one to seventy where they have not.⁸ 3. Daniel's test, which principally takes into account the absolute gravity of the lungs, and the other changes produced by respiration, as the inflation of the lungs, and expansion of the chest.⁹ These tests

des Kindermord, Hanover, 1824; Devergie, *Med. Leg.* i. p. 186, 255; Siebenbarr, *Handb.* ii. p. 8, 626; Friedreich, *Handb.* i. p. 709; Schurmayer, *Ann. der Staatsarzneykunde*, vol. x., p. 417; Barzellotti *Med. Leg.* (Bianchi's ed.) Milan, 1839, vol. i. p. 318, with notes by Bianchi, beginning at p. 454; Orfila, *Med. Leg.* p. 117, vol. 2, 1848.

¹ Meckel *Lehrb.* s. 244; Henke *Lehrb.* s. 80; Devergie *Medicine Legale*, i. p. 190; Mende ii. p. 242; Friedreich, *Handb.* p. 113; Guy (*Am. ed.*) p. 122; Orfila, *Med. Leg.* p. 154, vol. 2.

² Mende, *Handb.* ii. p. 294; Meckel *Lehrb.* s. 444; Beck, *Elements*, i. p. 176; Orfila, *Med. Leg.* p. 181; Guy (*Am. ed.*) p. 122; *Annales D'Hygiene*, Apr. 1831; *Ann. D'Hyg.* 1842, p. 343; Henke's *Zeitschrift*, 1841, ii. p. 235.

³ Post, p. 358, 9-1, ante, p. 286.

⁴ Buettner *Anweisung*, s. 54, 66; Henke, *Lehrb.* s. 509, 515; Henke *Abhandlung*, vol. ii. No. 3, and vol. v. p. 128; Gans vom Kindermord, p. 108, 135; Orfila, i. p. 292; Devergie *Med. Leg.* vol. i. p. 202, 224; Schneider, *Annalen der Staatsarzneykunde*, ii. b. 1, p. 35, vi. p. 195 and 601, vii. p. 444, viii. p. 679, x. p. 424; Barzellotti *Med. Leg.* i. p. 324; Thomson, p. 130; Guy *For. Med.* p. 123; Taylor *Med. Juris.* p. 440; Puccinotti, p. 78; Taylor (*Am. ed.*) p. 359; Orfila, ii. p. 172.

⁵ See Klein's *Annalen*, xviii. p. 171.

⁶ Mende *Handb.* pt. i. p. 201; Henke *Lehrb.* s. 566, 568.

⁷ Mende, *Handb.* i. p. 215; Henke, *Lehrb.* s. 569, 570; objections to the test by the bladder in Mende, *Handb.* iii. p. 244; Henke, *Abhandl. Medicin*, i. p. 24; Meckel, *Lehrb.* s. 269; Friedreich, *Handb.* p. 778; to the suggillatory test in Mende, *Handb.* iii. p. 137; Henke, *Abh.* i. p. 28; Friedreich, p. 774.

⁸ Friedreich, p. 822.

⁹ Meckel, *Lehr.* s. 252; Friedreich, p. 822; *Vorschlag zur neuen hydrostat. Lungenprobe*, Vienna, 1821; Wildburg, *Neuer Vorschlag zur ollstaend. an stellung der Lun-*

are based upon the assumption that a new-born child can only breathe after it has left the womb; that the first breath drawn is the beginning of life, and is to be detected by the changes it produces upon the lungs in point of colour,¹ absolute weight,² relation to the other organs, and specific gravity, the influx of the atmosphere causing them to float. Rigid investigations into the nature of the pneubio-mantic test have elicited many strong arguments against its sufficiency;³ and although undue importance has been attached to several of them, particularly to that derived from the so-called *vagitus uterinus*, i. e. the cry uttered by a child in the mother's womb, before the birth is completed,⁴ which, from the extreme rarity of the occurrence,⁵ is not entitled to serious consideration;⁶ yet as the symptoms detected by the hydrostatic test are not necessarily the effect of extra uterine life in the child, but may also be produced by artificial inflation,⁷ and by decomposition,⁸ it is clear that this test is of no value,⁹ since children have lived many hours and yet but a few vesicles were developed,¹⁰ except where great care in conducting the examination is established, every doubt on the score of artificial inflation and decomposition excluded, and the result found to corroborate the inferences in favour of the life of the child, which are to be legitimately drawn from the other circumstances brought to light by the investigation.¹¹ At all

gengprobe, Berlin, 1822; Wildberg. Darst. der Lehre von der pneubio-mant. Leipsic, 1830; Puccinotti, Med. Leg. p. 85; Orfila, ii. p. 173; Taylor (Am. ed.) p. 359; Guy (Am. ed.) p. 150.

¹ Buetter Anweisung, p. 35; Ibid. contra Schmidt, Versuche und Erfahrungen aneber die Lungenprobe, p. 240; Mende Handb. i. p. 190; Guy (Am. ed.) p. 151; Taylor, 359; Ed. Med. and Surg. Journal, xxvi. p. 367; Orfila, ii. p. 134, 175.

² Med. Leg. ou considerat sur l'Infanticide, par Lecreux, p. 44; Annalen der Staatsarzneikunde, viii. p. 679; Dic. de Medicine, tom. xvi. p. 323; Guy (Am. ed.) p. 153; Fodere Med. Leg. tom. iv. p. 484, (2d ed.); Devergie, tom. i.; London Lancet, Oct. 1842; Orfila, ii. p. 175; Plouquet Test, Med. Leg. i. 55-6; Ann. D'Hygiene, 1835, p. 485; and Med. Guzet, 1842, p. 208.

³ Schmitt Neue Versuche und Erfahrungen ueber die Lungenprobe, Vienna, 1806; Henke Revision der Lehre von der Lungenprobe, Berlin, 1811, vol. ii. No. 3, and Henke Abh. v. p. 128; Henke, in the "Zeitschrift fur Arzneikunde," 1821, No. 3 and 4; Henke Lehrb. s. 511, 564; Meckel, Lehrb. s. 262, 572; Olberg, diss. de docimasia pulmon. hydrostat, Halle, 1791; Mende, Handb. iii. p. 480, &c.; Gans, vom Kindermord, p. 110, 126; Archiv. des Crim. R. vii. p. 502, 522; Ann. D'Hyg. and Med. Leg. Apr. 1831, p. 406; Devergie, i. p. 581, 694; Friedreich, Handb. p. 788; Barzellotti Med. Leg. i. p. 328; Ann. des Staatsarzneik. ii. p. 35, vi. p. 195; Friedreich, Centralarchiv, vol. i. p. 337; Guy For. Med. 128; Taylor, p. 454; Orfila, ii. p. 187, and objections, i. p. 188; Ann. D'Hyg. 1837, p. 437; also, 1841, p. 429; Brit. and For. Med. Rev. Jan. 1842; Dr. Dane's Med. Gazette, vol. xi. p. 1022.

⁴ Henke Abh. ii. p. 117; Hufeland Journ. der Prac. Heilkunde, 1823, No. 2, p. 89; Schmitt, Versuche, p. 159; Mende Handb. iii. p. 290; Hitzig's Zeitschrift, No. 1, p. 146, &c.; Devergie Med. Leg. i. p. 204; Bianchi's Notes to Barzellotti, p. 473; Orfila, ii. p. 501.

⁵ Schuermayer in Annalen, p. 126.

⁶ Friedreich Hand. p. 804; Thomson, Gerichtl. Arzneik. p. 131.

⁷ Henke, Abh. ii. p. 147; Schmitt, Versuche, p. 177; Mende Handb. iii. p. 491; Egert, p. 241; Beck, p. 253; Friedreich, p. 498, *contra*, Schuermayer in Annalen, p. 439; Thomson, p. 239; Guy, p. 144; Taylor, p. 461.

⁸ Mende Handb. iii. p. 494; Henke Abh. ii. p. 152; Beck, Elements, i. p. 259; Thomson, p. 237; Friedreich, p. 795; Guy, p. 135; Taylor, p. 449; Puccinotti, p. 90.

⁹ Schmitt, Versuche, p. 216; Lecieux Med. Leg. p. 36, 58; Bernt. Vorschlag, p. 18; Henke Abh. ii. p. 134-141; Remer in Henke's Zeitschrift fuer Staatsarzneik, vol. i. No. 1, p. 64; Hitzig's Zeitschrift, No. 20, p. 313, *contra*, Gans Zeit. c. 1, p. 528-540; Friedreich, Central Archiv, vol. i. p. 306; Puccinotti, p. 96.

¹⁰ Orfila, ii. p. 203; Guy's Hospital Reports, vol. v. p. 355.

¹¹ Thomson, p. 245; Mende, die Menschliche Frueht, p. 116; Mittermaier, Archiv. . Juris. p. 472, 467.

events, it goes to prove only the respiration, and not the extra uterine life of the child; and in this connexion it is important to consider the cases in which the child when born was not really dead, but prevented from breathing by exhaustion, or the accumulation of phlegm in the windpipe.¹ The fact that the child did not breathe will not warrant the conclusion that it did not live, for the specific gravity of the lungs may be affected by disease.² Of still greater importance is the observation that respiration, more or less perfect, may take place during delivery,³ for the child may have died in the course of a protracted birth;⁴ and hence it does not follow that the child lived out of the mother's womb. Even with all the improvements recently proposed, this test can never afford conclusive proof of the extra uterine life of the child,⁵ but will only serve where the conditions above stated are fulfilled to corroborate others.⁶ The present inclination of the common law authorities, as has already been observed,⁷ is, that in order to make homicide, an independent circulation and existence should be affirmatively proved, mere *respiration* during the course of birth not being enough.

In examining the question of *adequate vitality*,⁸ it will not suffice to determine that the child was at such a state of maturity as would sustain life out of the womb,⁹ but the possible existence of any malformation, (as fissures in the spine, or absence of a skull,)¹⁰ which by the laws of nature would take away the capacity of living,¹¹ must be looked to. Had such a test been applied, in more than one recent case, great expense and much public time would have been spared; and it is due to the supposed offender that it should be in all instances attended to before a trial is gone into.

To establish the proofs of the recent birth of the child, as well as to determine the grade of offence at which the indictment is to strike,¹² it is a primary duty to fix with accuracy, both the time at which it was born and when it probably died.

(2.) *The person suspected.*

With regard to the person suspected of infanticide, the inquiry is whether the woman supposed to be the mother was pregnant and delivered at a time corresponding with that of the birth of the child, and under circumstances tending to substantiate the suspicion that

¹ Henke, Abh. ii. p. 103; Meckel Lehrb. s. 265; Taylor, 458.

² Friedreich, 790.

³ Taylor, 455.

⁴ Bianchi, p. 572; Friedreich, p. 803.

⁵ Henke Abh. v. p. 142; Orfila, i. p. 341; Devergie Med. Leg. i. p. 221; Friedreich, p. 827—831.

⁶ 2 Mittermaier, Deut. St. s. 123.

⁷ Ante, p. 286, post, 358, 359.

⁸ Taylor's Med. Juris. p. 351; Gans, von Kindermord, p. 64, 309; Mittermaier Neue Archiv. vii. p. 416; Devergie, Med. Leg. i. p. 368; Feuerbach's Lehrb. s. 237, note.

⁹ Anmerkungen zum baier Strafgesetzbuche, ii. p. 34; Henke, Abh. iii. p. 265; Taylor's Med. Transac. p. 352; Guy's For. Med. 177, 183; Helie Theorie du Code Penale, vol. v. p. 194.

¹⁰ Guy's For. Med. p. 183; Meckel Lehrb. p. 346.

¹¹ Mende, Hand. ii. p. 328, 365.

¹² Mittermaier, Archiv. vii. p. 304—316; Henke, Zeitschaf. fuer Staatsarzneik, 1827, No. 2, p. 394; Feuerbach, s. 237, note; Briand et Bresson Medicine, p. 167; Olivier Ann. d'Hyg. tom. xvi. p. 2; and Helie, v. p. 169; Bianchi, i. p. 455, notes; Taylor's Med. Juris. p. 394.

an offence has been committed against it. Where such suspicion is on good grounds excited, the proper course is for the officer charged with the investigation of the offence, to tender to the person accused the opportunity of an immediate medical examination to be conducted by professional examiners if possible. In a trial in 1840, in Philadelphia, for this offence, the want of such a precaution was pointedly brought to notice by evidence introduced by the defence, that the formation of the female, who was a voluntary witness for the prosecution, was such as made the destruction of the child *en ventre sa mere* necessary; and had it not been for an unexpected adjournment which enabled a medical examination to be had, the defendant would have been acquitted. In such an examination it is important to ascertain whether, and when the woman gave birth to a child, and whether in cases of abortion, there is any such mal-formation as made an abortion necessary.¹

The fallaciousness of the proofs of virginity,² and that of the signs of pregnancy,³ in general, in particular of a recent delivery, on which Orfila remarks, that it is difficult to determine whether a woman has given birth to a child eight or ten days after, and often still more difficult in cases of abortion,⁴ should throw, however, great caution around the collection and reception of this species of evidence, since the present tendency of medical authority is that the apparent signs of a recent delivery may also be the consequence of other diseases;⁵ where, therefore, the accused denies the delivery, and refers to a disease as the cause of her condition, an inquiry must be had into the truth of her allegation.

(3.) Cause of death.⁶

Starting with the position that the life of the child after the birth is no ground for supposing that its subsequent death was brought about by violence on the part of the mother, it should be observed, that even where appearances go to show a violent death, the prosecution by no means possesses such conclusive testimony as to relieve it from further investigation, since the cases are numerous where the death is shown to have been caused during the travail by fortuitous circumstances, as, for instance, suffocation,⁷ fracture,⁸ change of the situation of the mother,⁹ or by some omission, for which the mother

¹ Meckel, Lehrb. der Gerich. Med. s. 324—329.

² Mende, Handb. iv. p. 420—450; Beck's Elem. i. p. 77; Friedreich, Handb. p. 261; Guy's For. Med. p. 68; Dean's Med. Juris. p. 27.

³ Henke, Lehrb. i. s. 186—191; Meckel, Lehrb. s. 585; Mende, Handb. iv. p. 516; Beck, i. p. 114; Mittermaier, Neue Archiv. des Criminals, vol. x. p. 380; Devergie, Med. Leg. i. p. 161; Friedreich, p. 318.

⁴ Orfila, i. p. 273; Henke, Lehrb. s. 342; Capuron, c. i. p. 128; Mende, Handb. iv. p. 680—712; Beck, p. 147; Hitzig, Zeitschrift, No. 20, p. 234; Devergie, c. i. p. 171—177.

⁵ Devergie, Med. Leg. i. p. 174; Friedreich, p. 386; Orfila, vol. i.

⁶ See, generally, Siebenhaar, Handb. p. 713; Guentner, Kindesmord, p. 47; Annalen d'Hyg. Leg. 1840, No. 48, p. 341; Taylor, p. 487; Orfila, vol. ii. p. 251.

⁷ Henke, Ala. i. p. 71; Mende, Handb. i. p. 230; Capuron, p. 340—356; Meckel, Lehrb. p. 386.

⁸ Henke, Abh. i. p. 52; Mende, Handb. i. p. 149; Mittermaier, Neue Archiv. des Crim. R. vii. p. 631; Mende, des Fruchtkind, p. 95; Friedreich, p. 719; Puccionotti, Med. Leg. p. 99; Taylor, p. 487; Orfila, vol. ii. p. 253.

⁹ Mittermaier, Archiv. ii. p. 648—651; Devergie, Med. Leg. i. p. 246.

cannot be made accountable;¹ and the legal profession are charged, also, by a late American writer, to bear in mind that a delivery may take place without the knowledge of the mother,² and that many symptoms formerly looked upon as infallible signs, as bruises and bloody sores, have been found to be in the highest degree fallacious.³ Injuries to the head of the child should be closely scrutinized, to see whether they are not the consequences of pregnancy,⁴ or of the birth; and it is said, that tumours on the head in particular, are often susceptible of a natural explanation, without any regard to violence.⁵ In calculating the probability of the fall of the child as the cause of the death,⁶ it is necessary to take into account⁷ every circumstance which can affect such estimate; as place, distance, position of the mother, condition of the umbilical cord, clothing worn by the woman. At all events there is nothing in the asserted improbability of injurious effects from the fall of the child.⁸

In cases of this class it is a fact which must have been noticed by all practitioners, that in a great majority of instances of *deliberate* infanticide, and in many of accidental, the child is found in a privy;⁹ and where the birth is suspected to have occurred in the same place, the spot where the mother sat, and the place through which and on which the child is supposed to have fallen, the German text writers tell us, must be closely examined.¹⁰

It should be observed that the omission to loose the umbilical cord can never in itself be pronounced with certainty to have caused the death of the child;¹¹ although in certain cases the hemorrhage consequent upon it may have done so; and it would be unsafe to rest, for technical reasons, on this point alone, as the weight of medical authority now is, that though much depends on the condition of the child, the manner in which the umbilical cord was severed, and the length of the piece remaining attached to the child, yet the death cannot be positively traced to this cause.

Where the death is or may be attributed to a fall, it is proper to inspect the spot where the birth is alleged to have taken place, partly to determine the hard places on which the child is said to have fallen, and partly to ascertain the nature and amount of blood and other

¹ Devergie, i. p. 231; Friedreich, p. 715; Guentner, der Kindesmord, p. 51; Orfila, vol. ii. p. 255; Puccinotti, p. 97.

² Beck's Elements, i. p. 166.

³ See Naegelé, Erfahr. und Abh. ans dem Gebiete der Krankheiten des Weiblichen Geschlechts, p. 247; Mende, Handb. iii. p. 138.

⁴ Mende, des Fruchtkind, p. 54—63.

⁵ Zeller, Heidelb. 1822; Feist, Mayenne, 1839; Friedreich, 1845, vol. ii. p. 437.

⁶ Klein, Stuttgart, 1817; Klein, Beitr. zur Gerichtl. Arzneiwissenschaft Tuebingen, 1825; Henke, Abh. i. p. 63, pt. iii. No. 1; Mende, Handb. i. p. 227, iii. p. 149; Hitzig, Zeitschrift, No. 25, p. 56, 67.

⁷ Mittermaier, Archiv. vii. 633—639.

⁸ Ann. d'Hygiène, 1840, No. 48, p. 331; Friedreich, Handb. p. 729; Devergie, i. p. 493; Siebenhaar, Handb. ii. p. 639; Friedreich, Central Archiv. 1845, vol. iii. p. 441; Orfila, i. 379; Eggert, p. 281; Guentner, Kindesmord, i. p. 53; Taylor, p. 481; Guy's For. Med. p. 151.

⁹ Klein, Ann. der Gesetzgebung, xv. p. 225; Pfister Criminal faelle, v. iii. No. 1.

¹⁰ Pfister, Crim. v. p. 601; Ann. der Staatsarzneikunde, by Schneider, 1839, iv. p. 174.

¹¹ Beck's Elements, i. p. 282; Mende, Handb. iii. p. 290; Siebenhaar, Handb. ii. 644; Friedreich, Handb. 736; Ann. d'Hyg. xxv. 126, and xxvi. 244; Bianchi in Barzellotti's Med. Leg. 481; Guentner, 49.

matter discharged by the parturient. It is indispensable to establish, with the greatest possible exactness, the time of the probable conception, as it is of importance in estimating the period of gestation; also, the health of the mother when she first felt the motions of the child, her deportment during pregnancy, whether she concealed it, and what work she performed during its continuance. Evidence should also be collected as to the exact progress of the birth, the time when the labour began, (often the best means of unravelling prevarication,) the demeanour of the patient, the occurrences after the birth, and the duration of the travail. Whenever the accused herself suggests an explanation of the death of the child, the possibility of such explanation should be submitted to the judgment of medical men, or determined by repeated inspections, if she voluntarily submits to them.

The following observations of Mittermaier, (from whose admirable treatise most of the foregoing chapter is drawn,) are worthy of much weight. "In inquests of infanticide, where the fact of a delivery is not well established, particular indications are found in the suspicious intercourse of an unmarried woman with a man, if followed by ailments, or changes of appearance, or enlargement of the abdomen, denoting pregnancy; the sudden disappearance of these changes, the condition of her linen, or other tokens of a delivery, especially if the latter is established by inspection. The greater the concealment of the pregnancy the greater the suspicions, though this concealment must have been by actual contrivance, or silence towards persons who had a right to ask. These suspicions may be further increased by the obstinate refusal to produce the child; although it must not be overlooked, that the absence of a dead child may also be explained without accusing the mother of murder. If the corpse is discovered, it must be identified as the same child to which the accused gave birth, and scrutinized, remembering, however, that late researches have established the insufficiency of many proofs heretofore claimed as decisive. If found to bear traces of a violent death, the demeanour of the accused becomes important, and the more studiously she concealed her pregnancy, or has studiously deprived herself of attendance at the time of delivery, or betrayed by her subsequent behaviour not only the intention to conceal the delivery, but fatal designs upon the child, the more foundation is there for judicial investigation; bearing in mind, however, that the accused may not before delivery have been entirely aware of her condition, and that it is a point of controversy whether a concurrence of the three indications of concealment of pregnancy, birth without attendance, and concealment of the corpse, is necessary to afford strong evidence of infanticide."¹

(4.) *Quickness.*

Wherever there is a difference in the grade of punishment attached to the destruction of a "quick" child, and one not yet so, or wherever the destruction of the latter is held not to be indictable, this becomes an important subject of inquiry. As has been fully shown elsewhere,² the destruction of a child unborn is a high misdemeanor, and at an early

¹ Mittermaier, *Dent St* a 190

² *Whar Cr. Law*, 2d ed. 455.

period it seems to have been deemed murder.¹ If the child die subsequently to birth from wounds received in the womb, it is clearly homicide,² even though attached to the mother by the umbilical cord.³ It has been said that it is not an indictable offence to administer a drug to a woman, and thereby procure an abortion, unless the mother is *quick* with child,⁴ though such a distinction, it is submitted, is neither in accordance with the result of medical experience,⁵ nor with the principles of the common law.⁶ The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation; and it is clear that no matter at how early a stage, he may be appointed executor,⁷ is capable of taking as legatee,⁸ or under a marriage settlement,⁹ may take specifically under a general devise, as a "child,"¹⁰ and may obtain an injunction to stay waste.¹¹ Such, also, has been distinctly held to be the law in Pennsylvania,¹² though the contrary has since been held in Massachusetts,¹³ in New Jersey,¹⁴ and in Maine.¹⁵

Perhaps, however, as the point may be considered as still unsettled, a recapitulation of the reasoning formerly given may not be out of place.

The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction," as it is called by Dr. Guy,¹⁶ is now exploded in medicine, the fact being considered indisputable, that "quickening" is the incident, not the inception of vitality. This view is clearly expounded by Dr. Beck.¹⁷ "The motion of the fœtus," he says, "when felt by the mother, is called QUICKENING. It is important to understand the sense attached to this word formerly, and at the present day. The ancient opinion, and on which indeed the laws of some countries have been founded was, that the fœtus became animated at this period—that it acquired a new mode of existence. This is altogether abandoned. The fœtus is certainly, if we speak physiologically, as much a living being immediately after conception, as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received. The next theory attached to the term, and which is yet to be found in many standard works, is, that from the increase of the fœtus, its motions, which had hitherto been feeble and imperfect, now are of sufficient strength to communicate a sensible impulse to the adjacent parts of the mother.

¹ 1 Russ. on Cr. 671; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Hale, 434; 1 East, P. C. 90; 3 Chitty, C. L. 798.

² R. v. Senior, 1 Mood. C. C. 346; 3 Inst. 50; see ante, p. 286, 341, 359.

³ R. v. Trilloe, 2 Mood. C. C. 413.

⁴ Com. v. Bangs, 9 Mass. 387.

⁵ Guy's Med. Juris., tit. Abortion; 1 Beck, 172, 192; Lewis, C. L. 10.

⁶ 1 Russ. on Cr. 661; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Bracton, l. 3, c. 21.

⁷ Bac. Ab., tit. Infants.

⁸ 2 Vernon, 710.

⁹ Swift v. Duffield, 6 Serg. & Rawle, 38; Doe v. Clark, 2 H. Bl. 399; 2 Ves. jr. 673; Thelluson v. Woodford, 4 Vesey, 340.

¹⁰ Fearn, 429.

¹¹ 2 Vernon, 710.

¹² Com. v. Dain, 6 P. L. J. 29. S. C. Brightly, R. 441; Wells v. Com. 1 Harris, 631.

¹³ Com. v. Parker, 9 Metc. 263.

¹⁴ State v. Cooper, 2 Zabriskie, 57.

¹⁵ Smith v. State, 3 Redding, 48.

¹⁶ Med. Juris. 133.

¹⁷ Med. Juris. vol. i. p. 173.

In this sense, then, quickening implies the first sensation which the mother has of the motion of the child which she had conceived.

"A far more rational, and undoubtedly more correct opinion, is that which considers quickening to be produced by the *impregnated uterus starting suddenly out of the pelvis into the abdominal cavity*. This explains several peculiarities attendant on the phenomenon in question—the variety in the period of its occurrence—the faintness which usually accompanies it, owing to the pressure being removed from the iliac vessels, and the blood suddenly rushing to them; and the distinctness of its character, differing, as all mothers assert, from any subsequent motions of the fœtus. Its occasional absence in some females is readily accounted for, from the ascent being gradual and unobserved."

The true meaning of quickening, and the absurdity of the doctrine that it is the inception of life, is pointedly shown by Orfila, in the recent edition of his very authoritative treatise.¹

"Chez la plupart des femmes le fœtus exerce des mouvemens que l'on a appelés *actifs*: c'est particulièrement vers la fin du quatrième mois, lorsque les organes de la locomotion jouissent déjà d'une certaine energie, que ces mouvemens sont sensibles; ils deviennent quelquefois si forts par la suite, qu'on les aperçoit même à travers les vetemens, et que la femme en est réveillée pendant la nuit: l'homme de l'art parvient souvent à les provoquer en appliquant sur les parois du ventre la main préalablement trempé dans l' eau froide. Ce signe qui paraîtrait au premier abord devoir permettre d'affirmer que la femme est ou n'est pas enciente, presente pourtant beaucoup d'incertitude; non seulement il y a des femmes qui n'ont pas senti de pareils mouvemens à aucune époque de la grossesse, mais il en est beaucoup d'autres chez lesquelles des contractions spasmodiques de l'uterus et des intestins simulaient tellement les mouvemens du fœtus qu'elles se disaient encientes."

These views are fully sustained by the result of a very curious investigation before a jury of matrons in England in 1838.² As the case is very curious in more than one respect, it is given in full. "The prisoner was indicted for the wilful murder of Anne Wycherley, the younger, a child aged three years, by drowning her. The case was clearly proved, and the prisoner was found guilty. The learned Baron passed sentence of death upon her; and on Mr. Bellamy, the clerk of assize, asking the prisoner if she had any thing to say in stay of execution, she replied, 'I am with child now.'—Gurney, B. Let the sheriff empanel a jury of matrons forthwith. Let all the doors be shut, and no one be suffered to leave the court.³ The under-sheriff went to twelve married ladies who were present in court, and having obtained their names, he returned them in a panel to Mr. Bellamy, and these ladies were then called by Mr. Bellamy,

¹ Traité de Médecine Legale, Paris, 1848, vol. i. p. 226.

² R. v. Wycherley, 8 C. & P. 265.

³ For the authorities on this subject, see 3 Inst. 17; 2 Curw. Hawk. 657; 1 H. P. C. 368; and 2 H. P. C. 413, where Lord Hale says, that the jury is to be a jury of "discreet women." We believe that the reason of the order for closing the doors of the court, (which is always given before a jury of matrons is empanelled,) is to prevent the ladies from leaving the court, and thus preventing a jury of matrons de circumstantibus from being empanelled.

and having answered to their names, the forematron was sworn in the following form:—"You, as forematron of this jury, swear that you will diligently inquire, search, and try Anne Wycherley, the prisoner at the bar, whether she be quick with child or not, and thereof a true verdict give, according to the best of your skill and knowledge. So help you God." The other matrons were then sworn as follows: "The same oath which your forematron has taken on her part, you shall well and truly observe and keep on your respective part. So help you God." A bailiff was then sworn in the following form:—"You shall well and truly keep this jury of matrons without meat, drink or fire, candle light excepted; you shall suffer no person but the prisoner to speak to them; neither shall you speak to them yourself, unless it be to ask them if they are agreed on their verdict, without leave of the court. So help you God." The jury of matrons then retired to a private room, and the prisoner was taken to them. After a short time they sent a message into court that they wished for the assistance of a surgeon.—Gurney, B. I think that I ought not, considering the terms of the bailiff's oath, to allow a surgeon to go to the room in which the jury of matrons is, and that they should come into court.¹ The jury of matrons came into court, and having publicly expressed a wish for the assistance of a surgeon, Gurney, B., directed Mr. Greatorox, who was a surgeon and accoucheur, and who was a witness in another case,² to retire and examine the prisoner. This was done, and on the return of Mr. Greatorox to the court, he was sworn, 'You shall true answer make,' &c., and he stated that he saw no reason to believe that the prisoner was quick with child, his opinion being that she was not with child at all, but that if she was, she could only be in a very early stage of pregnancy. Gurney, B. 'Quick with child' is having conceived. 'With quick child' is when the child has quickened. Do you understand the distinction I make?—Mr. Greatorox, I do, my Lord. The jury of matrons again retired, and on their return into court, they found a verdict that the prisoner was not quick with child."³

¹ We are informed, says the reporter, that some years ago a jury of matrons was empanelled at Chester, and that in that instance the surgeon went to the room in which the jury and prisoner were, which seems not only to have been in some degree inconsistent with the terms of the bailiff's oath, but was also open to the objection, that the surgeon was thus giving evidence out of the presence of the judge, which evidence might possibly be of a nature to be perfectly inadmissible in point of law, as being hearsay or the like.

² The wife of this gentleman was the forematron of the jury.

³ Before the time appointed for the execution of the prisoner, she was respited, in order that it might be ascertained with certainty whether she was with child or not.

Dr. Paris says, (*Med. Jour.* vol. 3, p. 90.) "The popular idea of quick or not quick with child is founded in error;" and he also says, (*Id.* vol. 1, p. 209). "About the 16th or 18th week after conception, the uterus suddenly ascends from the pelvis into the abdomen, a change which is attended with a very peculiar sensation to the woman, and is erroneously called 'quickening,' from its having been supposed to arise from the first motions of the fœtus in utero, which was imagined at this period to receive the essence of vitality. The physiologist is now satisfied that the sensation has no relation either to the life or to the motions of the fœtus, but is solely attributable to the sudden change in the position of the uterus; nor is there any difference between the aboriginal life of the child and that which it possesses at any period of pregnancy, though there may be an alteration of the proofs of its existence by the enlargement of its size and the acquisition of greater strength. The feeling of 'quickening' is very different from any thing that is excited by the subsequent motions of the child; it more nearly resembles that which is oc-

It appears then that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another—that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all—and that it is dependent so entirely upon foreign influences as even to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. There is as much vitality in a physical point of view on one side of quickening, as on the other, and in a social and a moral point of view, the infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards. But if the common law in making foeticide penal, had in view the great mischiefs which would result from even its qualified toleration, e. g., the removal of the chief restraint upon illicit intercourse, and the shock which would be sustained thereby by the institution of marriage and its incidents—we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed—the inducements to marriage are equally diminished—the delicacy of the woman is as effectually destroyed—no matter what may be the period chosen for the operation. Acting under these views, the legislatures of Massachusetts and New Jersey, in order to fill up the supposed gaps, passed acts making ante-quickening-foeticide individually penal. If, however, as has been argued, no such gap exists, it will be worth while for the courts of those states which have not legislated on the subject, to consider how far an exploded notion in physics is to be allowed to suspend the operation of a settled doctrine of the common law.

casioned by terror or agitation from any other cause, and is often followed by syncope [fainting] or hysteria. We shall indeed cease to be surprised at this effect when we consider that from the uterus thus changing its situation a very considerable pressure is suddenly removed from the iliac vessels, in consequence of which the blood rushes to the lower extremities, and temporary exhaustion of the vessels of the brain, and a general loss of balance in the circulating system, are the results. In some women the motion is so obscure as not to occasion any distress; and where the ascent of the uterus is gradual, it is often not felt at all."

A newly discovered symptom of pregnancy, which is considered a very decisive one, is mentioned by Dr. Parent du Chatelet, one of the members of the Conseil de Salubrite de la Ville de Paris, and physician of the Hospital de la Pitie, in his very able work recently published in Paris; he says, (Vol. 1, p. 217:) "*L'examen des parites genitales des prostituées faiait decouvrir a M. Jacquemin un nouveau signe de la grossesse qui peut encore, sous le rapport de la medicine legale devenir tres utile; ce signe consiste dans un coloration violacée, et quelquefois lie-de-vin, que contracte, dans cet etat particulier de la vie de la femme, toute la membrane muqueuse du vagin. Le signe est tellement evident, que M. Jacquemin ne s'y trompé jamais et qu'il lui suffit seul, independamment des autres signes de la grossesse, pour decider si cet etat existe. J'ai été temoin d'épreuves curieuses, aux quelles M. Jacquemin s'est soumis pour demontrer a ses confrères jusqu'où l'on pouvait, sur ce point, porter l'exactitude.*"

"Il fallait la reunion d'un grand nombre de prostituées pour permettre des recherches de cette nature; il fallait qu'elles fussent soumises a une inspection severe et minutieuse, pour decouvrir cette nouvelle particularité touchant les signes de la grossesse. *C'est sur un nombre de 4,500 femmes que M. Jacquemin a pu constater cet etat de la membrane muqueuse chez les femmes encientes.*"

The filles publiques at Paris are all obliged to be registered and licensed by the police, and they undergo a medical inspection twice in every month, which gives very great opportunity for investigation on points of this kind.

See also as to the symptoms of pregnancy, *CHAM. SUPP. Append. p. xxvi.*

CHAPTER XIII.

RIOTOUS HOMICIDE.

THE object of this chapter is to consider the law of that class of homicides which occur in the prosecution of unlawful assemblages. It is obvious that homicide of this character must fall under two general heads. When an unlawful assemblage takes place for the redress of a supposed *public* wrong, and particularly where its object is the extinction of government, the destruction of judicial process, or the resistance of executive authority as such, participation in it, to the extent of levying war against the government for these public purposes, becomes treason. Where, however, the intention is to redress a private or social grievance, and to incidentally resist process merely so far as may be necessary to effect the private or social end, the offence amounts not to the dignity of treason, and if during its commission life is lost, the offender must be tried for murder alone. Two observations, however, may properly be made in this connexion. (1.) Even supposing treason exists, the felony of murder or manslaughter does not *merge* in it. Merger only exists where a misdemeanor and a felony form a constituent part of the same act, as where an attempt to commit a larceny and the larceny itself unite. In such cases it is the felony alone that can be prosecuted. But *two* felonies cannot thus coalesce, for being each of equal dignity, neither sinks into the other. (2.) The domains of treason have become restricted within limits which exclude the great mass of those cases of general riot, which were formerly included within the term. It has already been noticed that during the necessities of civil war in England, the government for the time in power, acting on the fundamental principles that self-preservation was the duty of all governments, united with its predecessor in pushing the law of treason to its extreme verge, both as regards principle and temper. But in more recent days, when the crown has had nothing to fear from either dynastic or republican opposition, and when the government no longer feels it to be a contest for life between it and the state prisoner at the bar, the old policy has relaxed, and "levying war," in the definition of treason, is becoming gradually shorn of the constructive element, and restricted, as the term exacts, to the actual making of war against the state. The same amelioration of judicial construction has taken place, also, in our own country. In the earlier treason cases in Pennsylvania, those of Roberts and Carlisle, which took place in revolutionary times, the early English precedents were cited with approbation and adhered to with rigour. In Fries' trial, which took place during the administration of John Adams, when the government was scarcely settled, the same general views were expressed as obtained in England during the civil wars, and, a local opposition to the execution of the window tax, was construed

to be a "levying war," (as in those troubled times it perhaps was) against the government of the United States. But recently in Hanway's case, the Circuit Court of the United States, sitting in Philadelphia, after noticing the fact that the better opinion in England now is that the term "levying war," should be confined to insurrections and rebellions for the purpose of "overturning the government by force and arms," went on to say that a combination on the part of certain citizens, in a particular neighbourhood, to aid fugitive slaves in resisting their capture, even though such resistance results in murder and robbery, is not treason.¹ And aside from the fact that an exact construction of the constitutional definition of treason requires such a conclusion, the policy of government, even when the offence is clearly susceptible of double relation, certainly demands that that offence should be selected for prosecution which is the most simple in its nature, and the least political in its associations. It is apprehended, therefore, not only from the present tendency of the courts, but from the growing experience of government, that trials for treason will hereafter be limited to cases of direct opposition to government *as* government, and that in all other cases of riotous crime, the constituent offence against society or individual right, will be selected as at least the *primary* object of judicial action.

Homicides occurring during the prosecution of unlawful assemblages, may therefore be discharged at the outset from all considerations connected with the law of treason. For the purposes of practical consideration they will be divided into the following heads:—

I. The responsibility incurred by individuals who, though not actually and specifically parties to the overt act, are present and consenting to the assemblage by whom it is perpetrated.

II. How far provocation affects the degree.

III. How far the doctrine of self-defence applies.

IV. How far the degree is affected by resistance to officers of justice.

I.—The responsibility incurred by individuals who, though not actually and specifically parties to the overt act, are present and consenting to the assemblage by whom it is perpetrated.

"When divers persons," says Hawkins, "resolve generally to resist all opposers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions, who unlawfully engage in such bold disturbances of the public peace, in opposition to, and defiance of the justice of the nation."²

The joint responsibility of rioters for each other's misconduct, rests on two principles universally recognised under their respective heads. In the first place, when an act is committed by a body of men engaged in a common enterprise, such act is treated as if specifically committed by each individual. In the second place, homi-

¹ See Wh. Crim. Law, (3d edit.) tit. "Treason."

² 1 Hawk. P. C. c. 31, s. 51, Staundf. 17. 1 Hale, 439, *et seq.* 4 Blac. Com. 200.

cide individually committed in the pursuit of an unlawful felonious act, is murder at common law, no matter what that act be, even if it be so light a thing as the shooting of a tame fowl.¹ The application of these principles to cases of riotous homicide is obvious. Whether the parties are united in a common attempt to reduce a supposed grievance by violence, or are engaged in warring against each other, is no matter. Each individual is not only responsible for such acts of his associates as spring from the general design, but for such collateral acts as may be committed by his associates, with this distinction, that if the original unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design.² Thus, if several persons conspire to seize, with force and violence, a vessel, and run away with her, and, if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present aiding and abetting in executing the design.³ It should be observed, however, that while the parties are responsible for collateral acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus, if one of the party, of his own head, turn aside to commit a felony, foreign to the original design, his companions do not participate in his guilt.⁴ So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife; and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended any injury to the person killed, the judges were of opinion that the other could not be guilty, either as principal or accessory; and he was acquitted.⁵

The most ordinary case of a riot of this character is that of a sudden popular movement got up for the purpose of redressing some supposed grievance. The temper of a particular class is aroused by some outrage real or supposed, which they design to summarily punish. Cases of this character fall under two heads,—first, where the design is to inflict injury on the person or property, and secondly, where the object is death. If, as in the first case, a body of men, influenced by resentment, proceed to tear down an offensive building, or to remove certain objectionable obstructions, or even to inflict bodily violence short of death, each member is as responsible for the act of death, as if he himself was the sole agent. Nor does this complicity extend only to those who were united at the outset in the common design. Stragglers and idlers caught up by the mob in its progress, become involved in its guilt, to the very extent that they are aware of its general purpose. Any other principle would not

¹ See ante, 46.

² *U. S. v. Ross*, 1 Gallis C. C. R. 524; *Beets v. State*, Meigs, 106; *U. S. v. Travers*, 2 Wheeler's C. C. 508. See also the *Sissinghurst* case, ante, 77, 78.

³ *U. S. v. Ross*, 1 Gallis C. C. R. 524.

⁴ 1 Hawk. c. 31, s. 52. *State v. King*, et al., 2 Rice's S. C. Digest, 106.

⁵ 1 Hawk. P. C. c. 31, 52.

only secure indemnity for such crimes, but would destroy all efficiency in government. It is true that a man who drops mechanically into a crowd passing along the street is not responsible for a murder committed by one of the number, if he is entirely ignorant that they constitute an unlawful assembly. But that ignorance cannot exist after an order for dispersion is given by the lawful authorities. The man who, after such a moment, remains a passive spectator, is as responsible as he who takes an active part. For, indeed, it is from this very class of men the *power* of a mob is derived. The immediate mischief in riots in this country and England, has been always effected by a very few individuals; but the real harm has been done by the mass of passive spectators who prevent the prominent offenders from being reached by the police, and who, by their apparent sympathy, encourage the wrong doers, and produce the impression on the well-disposed, that what really is a small knot of reckless outlaws, is a well organized and respectable band of citizens seeking "redress" by their own agency. It will be readily seen, therefore, that under such circumstances, both the policy of society and the principles of justice require that responsibility should be *joint*. And indeed any reasoning that makes one individual responsible, makes all. Supposing, for instance, the object is to tear down a house, and in the process of destruction a person is killed by a stone cast at the building. In this case the individual who throws the stone may say with perfect truth, that he never intended to kill. But the common law attaches the consequences of murder to all homicide committed in pursuance of an unlawful act, and the "unlawful act" in this case is the riotous assemblage, of which the passive, though acquiescing spectator is as much a component part as the prime mover. At this point, also, it is important to keep in mind the qualification already noticed in another connexion. While all the individuals of a mob are jointly responsible for the acts of each other committed in pursuance of the common design, they are not so responsible for the results of the cupidity or malice of a particular person. Thus if an individual pilfer from a sacked house for his own gain, or take advantage of the confusion of the crowd to satiate his own malice by killing another, he does not shed any part of this, his particular guilt, upon his confederates. It is only for what he does in pursuance of the common object, that they are liable.

When this object is to inflict capital punishment, by what is called Lynch law, all who consent to the design are responsible for the overt act. It is not necessary to say that under our laws this is murder in the first degree. Of all species of homicide it is the one that most strikingly combines the two distinctive features of that type,—viz., deliberation, and a specific intent to take life.

It remains now only to consider that species of riotous homicides which arise in the collisions of two bands of men arrayed against each other. Of this, the Kensington riots in Philadelphia, in 1844, are an illustration. In the consideration of this class, more difficult questions arise. When two hostile bands parade the streets, intent upon an encounter, it is difficult to see how guilt lower than that of murder in the first degree can attach. But a more humane, as well as a more rational view—a view taken in the Philadelphia riots,—is,

that the blood being roused at the outset, continues so excited, and that there is either such a want of intent to take life as lowers the offence to murder in the second degree, or such general passion as lowers it to manslaughter. Supposing, however, that one party is the assailant, and the other is suffering under grievous provocation, it is obvious that here another element is introduced which will be considered under the next two heads.

In the appendix will be found a series of heretofore unreported cases falling under this head, in which the American law is fully developed. The leading English cases are as follows:—A party of five poachers having been sent by a keeper and his assistant, some words had passed, when three of the party ran in upon the keeper, knocked him down and stunned him; and when he recovered himself, he saw all of them coming by him, and one said, "Dam'em we've done 'em;" and when they had got two or three paces beyond him, one of them turned back and wounded the keeper in the leg, and then the men set off and ran away; Bolland, B., told the jury if they thought the prisoners were acting in concert, they were all equally guilty of inflicting the wound.¹

Where the whole of a party of poachers set upon and beat a keeper till he was senseless, and having left him lying on the ground, one of them, after they had gone a little distance returned, and stole his money, it was holden that he alone was guilty of the stealing.²

Two private watchmen, seeing the prisoner and another man with two carts laden with apples, which they suspected had been stolen, went up to them, and one walked beside the prisoner, and one beside the other man, at some distance from each other, and while they were so going along, the prisoner's companion stepped back, and with a bludgeon wounded the watchman he had been walking with; Garrow, B., "To make the prisoner a principal the jury must be satisfied that when he and his companion went out with a common illegal purpose of stealing apples they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them: but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal."³

Where the prisoners were hired by a tenant to carry away his goods to prevent a distress, and went armed with bludgeons and other offensive weapons; and the landlord, assisted by others, attempted to prevent it; and in the violence of the affray, after the constable had in vain attempted to disperse them, a boy standing at his father's door, who took no part therein, was killed by one of the company unknown; Holt, C. J., and Pollexfen, C. J., held it murder in all the party, by reason that the prisoners came armed with offensive weapons, and in a riotous way, and that they persisted in the affray after the constable had interfered to put a stop to it. But the majority of the judges held, that as the boy was unconcerned in the affray, the kill-

¹ R. v. Warner, R. & M. C. C. R. 380; S. C. 5 C. & P. 525.

² R. v. Hawk, 3 C. & P. 394.

³ R. v. Collison, 4 C. & P. 565.

ing of him could not be imputed to the rest, who were merely engaged in the general affray; that he could not be deemed an opposer to the party, so as to make him an object of this contention; and that they could no more be said to have abetted the killing of him than if one of the company had killed a person looking out of a window. The reasoning of the majority in the above case seems to have proceeded upon the defect of any evidence to show, that the stroke by which the boy was killed was either levelled at any of the opposing party, but had hit him by mistake, or was levelled at him upon the supposition that he was one of the opponents; for otherwise it seems that in either of these cases the same guilt would have attached upon all who were concerned in the same design with the striker as upon the striker himself. For if the act or design be unlawful and premeditated, and death happen from any thing done in the prosecution of it, it is clearly murder in all who take part in the same transaction. In the above case the two chief justices were of opinion, in which the others did not differ from them, that though the moving of the goods might be lawful, yet the continuing of the party together after the constable had ordered them to disperse was unlawful: and besides, that the great numbers who were thus assembled, and the unusual weapons they were armed with, did also make the assembly unlawful. Perhaps the more correct method, according to Mr. East, would have been for the jury to have found the fact one way or other, whether the stroke which killed the boy were or were not aimed at any of the assailants, or levelled at him mistaking him to be such.¹

The prisoners, eight in number, each having a gun, upon being found poaching by some keepers, who went towards them for the purpose of apprehending them, formed into two lines, and pointed their guns at the keepers, saying they would shoot them; a shot was then fired which wounded a keeper, but no other shot was fired: it was objected that it was clear that there was no common intent to shoot this man, because only one gun was fired, instead of the whole number; Vaughan, B., said, "That is rather a question for the jury, but still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the game-keepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it."²

Two poachers were apprehended by some game-keepers, and being in custody, called out to one of their companions, who came to their assistance and killed one of the game-keepers, it was held that this was murder in all, though the blow was struck while the two were actually in custody, but that it would not have been so, if the two had acquiesced and remained passive in custody.³

Upon an indictment for maliciously cutting, the question being, how far one prisoner was concurring in the act of the other; Park,

¹ 1 East, P. C. 259. *Rex v. Hodgson and others*, 1 Leach, 6. See *Plumer's case*, ante, 42, 46, post, 350. 12 Mod. 629. *Thompson's case*, Kel. 66. Anon. cited by Holt, C. J. 1 Leach, 7, note (a), and a case Anon. 8 Mod. 165. See also *Keilw.* 161, and *Borthwick's case*. Dougl. 202.

J., told the jury that, "If three persons go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out."¹

Several persons were engaged in a smuggling transaction; and upon an attempt to oppose their design by the king's officers, one of the smugglers fired a gun, and killed one of his accomplices. It was determined by the court, that if the gun were discharged at the king's officers in prosecution of the original design, which was a fact to be found by the jury, it would be murder in them all, although one of the accomplices happened to be killed. But if done intentionally and with deliberation against the accomplice from anger or some precedent malice in the party firing, it would be murder in him only. In order, therefore, to affect the particular case by the general purpose in view at the time the death happened, the killing must be in pursuance of such unlawful purpose and not collateral to it.²

II. *How far provocation affects the degree.*

The question here opened is one which involves the most important principles in the law of individual homicide, and which have been heretofore fully considered.³ It is proposed at present to notice them very briefly in the following relations:—

- (1.) Hot blood.
- (2.) Cooling time.
- (3.) Public wrong.
- (4.) Death of innocent third parties.
- (1.) *Hot blood.*

"Hot blood" alone is of no effect, unless it is attended with sufficient provoking causes. Such causes, when taken in connexion with riotous homicide, are comparatively limited. Heretofore they have been considered so far as they relate to public and private wrongs. At present it is sufficient to consider them in connexion with those affrays in which bodies of men are engaged with each other. When death occurs through a collision of groups of heated partizans between whom there has long been a grudge,—when such death is produced incidentally by an instrument not necessarily mortal,—and when this death, therefore, is connected with a passionate impulse arising from a temper already morbid with old griefs,—the offence is manslaughter. And so, also, if on a collision arising one or more of the parties hurries to his home, and still under the influences of passion, fetches fire-arms, and there kills another, the offence is but manslaughter. For when there is hot blood caused by a collision with a hostile party to any extent equal in strength, the law in its tenderness makes allowance for it by lowering the degree. It should be observed, however, that where one party is greatly superior to the other in strength, the former cannot be allowed the benefit of such a defence.⁴ A party has no right to entertain "hot blood" against one who is greatly his inferior in strength, and who has not

¹ Duffy's case, 1 Lew. 194.

² Plumer's case, Kel. 109, 12 Mod. 627; 1 Hale, 443. See as to cases of affrays, ante, 77—82.

³ See ante, 168, &c.

⁴ See ante, 189, 194.

the means of inflicting serious injury, to allow such a defence to be set up, would be to permit a wanton tyranny of the strong over the weak. It is true, in *Stedman's* case, it was held that where a woman, in return for words of gross provocation, struck a soldier with an iron patten on the face, who thereupon killed her, the crime was only manslaughter.¹ But this case has been very properly doubted by an eminent judge of our own day and country,² who says, in entire accordance with both the policy and the reason of the law, "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow indicted by a wife upon her husband, would bring the killing below murder." And this distinction is particularly applicable to cases of popular affrays. When there are two factions, (*e. g.*, the Orange and Roman Catholic Irish, who were the ingredients of the riots in Philadelphia in 1844,) who are in a state of temporary collision under circumstances of mutual aggravation and misconception, as long as each, under the influence of a heated imagination, has reason to apprehend injury from the other, the law takes compassion on this infirmity, and lessens the degree of homicide to manslaughter, provided there is no cooling time, and no premeditated use of deadly weapons. But where there is a marked preponderance in strength on the one side or the other, no degree of supposed provocation can relieve from the guilt of murder the individuals of an armed mob, which undertakes thus to follow up an obnoxious interest.³

(2.) *Cooling time.*⁴

The authorities all agree that if there is time to cool, taking in view all the circumstances in the case, hot blood can no longer be set up. Even supposing a murderous attack by one individual on another, or as the subject of this chapter requires, of one body of men upon another, if the party assailed has retreated so as to be out of danger, and is secure from further personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new conflict with the aggressor. If he do, and slay his assailant, the offence will be murder or manslaughter, according to the particular circumstances.⁵ Where the whole proceeding is infected with a continuous public excitement, and where the return to the conflict is so immediate and so associated in sentiment as to form part of the same transaction with the original assault, the law applies the original provocation to the fatal blow. What interval of time is necessary to exclude the hypothesis of continuousness, is of course, dependent upon the circumstances of the case and the temperament of the individuals. But a very good test is the interposition of other subject matters in the mind, and its intermediate voluntary adoption of different topics. Thus, it has been ruled that if between the provocation received and the mortal blow given, the prisoner fall into other discourse or diversion, and continue so a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subser-

¹ *R. v. Stedman*. *Fost.* 292; 1 *Hale*. 457, ante, 189, 195.

² *Gibson, C. J., Com. v. Mosler*, 4 *Barr.* 268.

³ See post Appendix.

⁴ See ante, p. 179, where this point is discussed in its general relations.

vient thereto, so that it may be reasonably supposed that his attention was once called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder.¹ It is obvious, therefore, that no measurement of time can be adopted in this respect. In periods of great public excitement, when men's minds have been so absorbed with a particular topic as to be incapable of considering any thing else, it takes a much greater period to cool after a supposed provocation than under ordinary circumstances. Care, however, should be taken in this as well as in all similar cases, lest the public excitement be used as a cloak for private cupidity or revenge.²

(3.) *Public wrong.*

The question as to what are the circumstances which will justify the abating of a public nuisance by popular action, is a difficult one, which it would be out of place to discuss here. It is a difficult matter, also, in our own community, to state positively what the law will be held to be, should judicial action ever be invoked in cases where a popular organization becomes necessary, or is supposed to become necessary, in order to sustain public order. The view sanctioned by Lord Loughborough in the great London riots of 1780, as well as that which the cases in the appendix show was judicially adopted in the Philadelphia riots of 1844, is that citizens may, of their own authority, lawfully endeavour to suppress a riot, and for that purpose may even arm themselves, and that whatever is honestly done by them in the execution of that object will be supported and justified by the common law. And as is well stated by Judge King, in one of the charges which will be given hereafter, even supposing there be no *public* organization, yet if one man sees another in the act of burning a church or dwelling house, or attempting to commit a murder, he has not only the right, but it is his duty to endeavour to prevent him.³ If the perpetrator resists, so as to make violence necessary in order to the prevention, the circumstances are a sufficient sanction and exculpation for the consequences of the violence, to *whatever degree it may extend*. This doctrine is undoubtedly sound, both in reason and law, in a case of individual criminality, and individual intervention to arrest it. If such be the case, it follows that citizens have the right in extreme cases, when the municipal government is insufficient, to establish a preventive police, and, if it be necessary, take life in order to prevent crime.⁴ But two qualifications to this position should always be kept in mind. In the first place, where there exist public officers, having jurisdiction, who will discharge their respective duties, it is proper for the voluntary police to put itself under their direction. "It would be more discreet," it was said during the London riots, "for every one in such case to be assistant to the justices and sheriffs in doing so." Of course this qualification does not exist where the proper authorities either will not act at all, or are themselves *malcontent*. In the second place, while this might extend to the *prevention* of crime, it does not include its punishment. Citizens, when acting either individually or in a body

¹ Com. v. Green, 1 Ashm. 289.

² See ante, p. 179.

³ See ante, p. 232.

⁴ Wh. C. L. 2d ed. 402; State v. Rutherford, 1 Hawks, 457; R. v. Haworth. 1 Mood. C. C. 207.

for such purposes, are bound, if they make an arrest, to lodge the offender in the common jail, or detain in safe keeping till the proper authorities can act.¹

(3.) *Killing third parties.*²

Where an unlawful assembly resorts to the use of deadly weapons, and death ensues to innocent third parties, it seems that such a homicide is murder at common law, supposing the guilt of the offender is not extenuated by such a state of hot blood as would reduce the grade to manslaughter. In Hare's case, given in the appendix, it is broadly stated, as will be seen, that such a homicide would be murder at common law, without any qualification from the state of the blood. This has not yet been expressly ruled, and it is apprehended that it is not the character of the deceased, but the relation and position of the offender, that determines the grade. Thus, for instance, if a man intending to kill a person attempting to commit a forcible and obvious crime against his person or property, by mistake kill one of his own family, it is homicide by misadventure only.³ And the same reasoning would indicate that where a man in hot blood slays an innocent bystander in mistake for a supposed assailant, the offence is but manslaughter. But be this as it may, it is clear that if by an unlawful assembly an innocent third party be killed, it is murder at common law, unless there be hot blood, and that whatever be the grade of the offence, it is shared by all individuals engaged in the affray. If, as has been well stated in Hare's case, and will presently be fully seen, the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, "a fight with fire arms between two bodies of enraged men should take place in a public street, and from a simultaneous fire, innocent citizens, their wives or children in their houses, should be killed by some of the missiles discharged,—shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assaulting the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire arms in the public highway of a thickly populated city, are they to have the benefit of impracticable niceties, in order to take their indemnity from the consequences of their own conduct?" It was said, however, that such homicide, in any view of the case, would not be murder in the first degree, as there would be wanting that specific malice which is necessary to constitute that offence. If, however, there is a *deliberate* killing of an innocent third party, knowing him to be such, the offence is murder in the first degree.⁴

¹ State v. Roane, 2 Dev. 58; Wh. C. L. 2d ed. 401.

² See ante, p. 42.

³ Wh. C. L. 2d ed. 284. See ante, 210.

⁴ Third parties is fully discussed.

CHAPTER XIV.

MURDER IN THE SECOND DEGREE.

THE principle on which rests the statutory distinction between murder in the first, and murder in the second degree, is that of the *lex talionis*, and took its origin from the admitted harshness of inflicting death for a homicide where death was not intended. By the common law, homicide unintentionally committed in pursuit of a felony,—e. g., in shooting a tame fowl with the intention of stealing it—was murder, and was punishable with death. It is true, that so long as death was the common punishment for almost all felonies, its infliction, in this instance, attracted comparatively little attention. But in this country, where capital punishment, generally speaking, was restricted to homicides, the injustice of taking life for what might, after all, be a mere species of misadventure, early attracted attention. No objection was taken to the common law distinctions. The general feeling was that it was proper that they should remain. The question was one of *punishment*, not of *definition*. It was felt that there was a large class of cases falling under the general head of murder, in which a jury ought to be allowed to say whether there was an intent to take life or not, and where no such intent was found, that it was proper that a sentence lighter than death should be inflicted. And it was to meet this class, that legislative action was invoked.

Pennsylvania was the first to move, and on April 22d, 1794, passed an act which has now been in substance incorporated in the codes of a majority of the states of the union. That the object of the act was to diminish the area of cases to which the penalty of death is applicable, is obvious from the first clause. "Whereas," it recites, "the design of punishment is to prevent the commission of crime, and to repair the injury that has been done thereby to society, or the individual; and it hath been found by experience, that these objects are better obtained by moderate, but certain penalties, than by severe and excessive punishments; and whereas, it is the duty of every government to endeavour to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety; therefore, no crime whatsoever, hereafter committed, except murder in the first degree, shall be punished with death in the State of Pennsylvania."

Then follows the operative clause:—

"And whereas, the several offences which are included under the general denomination of murder differ so greatly from each other in the degree of atrociousness, that it is unjust to involve them in the same punishment: All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpe-

tration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses, to determine the degree of crime, and to give sentence accordingly."

The "several offences which are included under the general denomination of murder," are not here distinguished analytically from each other. One alone is detached from the mass, and is particularly defined. On it alone the penalty of death is to be inflicted, and to separate it from the rest, the action of both jury and court are necessary. The remaining classes are to be distinguished from each other by the court alone, who are to grade the degree of imprisonment according to the extent of guilt. In these cases the jury are to find the general verdict, "guilty of murder in the second degree," and the court are thereupon to determine on the term of imprisonment within the range specified by the act.

To murder in the second degree it should always be remembered. *malice aforethought* is essential, and a new trial will be granted wherever a conviction for this grade takes place without this particular ingredient. Thus, in a late case in Tennessee, Turley, J., said: "We have been much astonished at the verdict upon which judgment in this case has been given. The prisoner, a youth of some fifteen years of age, has been found guilty of murder in the second degree; to constitute which crime, malice aforethought is a necessary ingredient, under circumstances from which, in our judgment, it not only cannot be inferred, but indeed, which directly disprove its existence. It appears that the prisoner, with some other youths of his own age, was playing marbles, when the deceased, a full-grown man, interfered in the game, and upon being remonstrated with for doing so, became turbulent, and commenced inflicting personal chastisement upon one of the boys; that while he was in the act of doing this, the prisoner threw a stone at him, which struck him on the head, and inflicted a wound of which he afterwards died. The prisoner had no previous ill-will against the deceased, and that the blow struck was not upon premeditation, but the result of sudden excitement produced by the misconduct of the prisoner himself, cannot be questioned; and the weapon used was not, in the hands of the person using it, of a dangerous character, and one well calculated to produce the result which followed its use. The result must have been wholly undesigned and accidental—the same boy, or any other, might have thrown the same stone or one like it, without the design of inflicting injury, a thousand times or more, without producing death; and yet the jury have thought it proper to hold the youth responsible for murder. This cannot be permitted; for murder has not been committed, either in design or by implication of law. A boy who, from being provoked wantonly and improperly by a man, becomes excited and throws a stone at him, and it accidentally so falls as in violation of all reasonable calculation of chances to kill

him, is to be held guilty of murder, and punished as a murderer. This would be cruelty, and not justice. It is true that the kind of murder of which the prisoner has been found guilty, is not now punished by death, but that it is not so, is owing to the interposition of a statute, for it is murder as described at common law, and it is requisite yet that it should have been perpetrated with malice aforethought either express or implied. There is no express malice; and it cannot be implied from the nature of the weapon used. The Attorney General argues that a very serious wound was inflicted; one which did produce *death*, and that this is a fair implication that the weapon used was of a character to produce the effect it did. This is ingenious, but fallacious; for the same thing might be argued of any case in which death accidentally ensued from the use of a weapon not calculated to kill. And, moreover, the wound of which the deceased died, is shown to have been of such a character as to make it, to say the least of it, problematical whether it was inflicted by the stone thrown by the prisoner. We have no hesitation in saying that the prisoner is not guilty of murder, though the deceased *died* of the blow struck by him. Whether he be guilty of manslaughter or not, is a question depending upon other propositions for its solution, and to be submitted to a jury, with all other matters in connexion with the transaction, upon a new trial. Judgment reversed and case remanded. Green, J. In this case, I think the throwing the stone by the defendant, was clearly unlawful, and as death ensued, it is a clear case of manslaughter. M'Kinney, J. Not being present in court when this case was heard, I decline any expression of opinion upon the point in respect to which my associates disagree.¹"

As will be seen by the inspection of the following statutes, the main features of the Pennsylvania act have been adopted in Maine, New Hampshire, New Jersey, Virginia, Alabama, Tennessee, and Michigan. In several other states it has been enacted entire.

MAINE.

Whoever shall, unlawfully, kill any human being, with malice aforethought, either express or implied, shall be deemed guilty of murder.—(Rev. Stat. ch. 154, sect. 1.)

Whoever shall commit murder, with express malice aforethought, or in perpetrating, or attempting to perpetrate, any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years, shall be deemed guilty of murder in the first degree, and shall be punished with death.—(Ibid. sect. 2.)

Whoever shall commit murder, otherwise than is set forth in the preceding section, shall be deemed guilty of murder in the second degree, and shall be punished by imprisonment for life in the state prison.—(Ibid. sect. 3.)

Section 4, provides that, upon an indictment for murder, the jury shall inquire and find whether the offence be of the first or second degree, or, if confessed, the court shall make the inquiry.

NEW HAMPSHIRE.

All murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery or burglary, is murder of the first degree; and all murder not of the first degree is of the second degree. If the jury shall find any person guilty of murder, they shall also find, by their verdict, whether it is of the first or second degree.—(Rev. Stat. chap. 214, sect. 1.)

¹ Holly v. State, 10 Hump. 141.

If any person shall plead guilty to an indictment for murder, the court having cognizance thereof shall determine the degree.—(Ibid. sect. 2.)

The punishment of murder in the first degree shall be death, and the punishment of murder in the second degree shall be solitary imprisonment, not exceeding three years, and confinement to hard labour for life.—(Ibid. sect. 3.)

CONNECTICUT.—Same as Pennsylvania.

NEW JERSEY.

Be it enacted, by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, That all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, sodomy, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate, by their verdict, whether it be murder of the first or second degree; but if such person shall be convicted on confession, in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly.—(An act, supplementary to an act, entitled, "An act for the punishment of crimes," passed the seventeenth day of February, eighteen hundred and twenty-nine, sect. 1.)

And be it further enacted, That every person convicted of murder of the first degree, his or her aiders, abettors, counsellors and procurers shall suffer death; and every person convicted of murder of the second degree, shall suffer imprisonment at hard labour, for any term not less than five, nor more than twenty years. (Sect. 2.)

VIRGINIA.

1. Murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder in the second degree.

2. Murder of the first degree shall be punished with death.

3. Murder of the second degree, by a free person, shall be punished by confinement in the penitentiary, not less than five, nor more than eighteen years.

4. Voluntary manslaughter by a free person, shall be punished by confinement in the penitentiary not less than one nor more than five years.

5. Involuntary manslaughter by a free person, shall be a misdemeanor.

6. If a person be stricken or poisoned in, and die, by reason thereof, out of this state, the offender shall be as guilty, and be prosecuted and punished, as if the death had occurred in the county or corporation in which the stroke or poison was given or administered.

7. If any free person administer, or attempt to administer, any poison or destructive thing in food, drink, medicine, or otherwise, or poison any spring, well or reservoir of water, with intent to kill or injure another person, he shall be confined in the penitentiary not less than three, nor more than five years.

ALABAMA.

Every homicide which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; so, also, every homicide perpetrated from a premeditated design, unlawfully and maliciously, to effect the death of any human being, other than him who is slain, or perpetrated by an act eminently dangerous to the life of others, and evincing a depraved mind regardless of human life, although without any preconceived purpose to deprive of life any particular individual; and every person, guilty of murder in the first degree, shall, on conviction, suffer death, or confinement in the penitentiary for life, at the discretion of the jury trying the same.—(Penal Code, chap. 111, sect. 1; Clay's Digest, 412.)

[The next section provides that all other cases of murder, at common law, shall be murder in the second degree; and punishable by imprisonment for not less than ten years.]

TENNESSEE.

All murder which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain, in their verdict, whether it be murder in the first or second degree; but if such person shall confess his guilt, the court shall proceed by the empannelling of a jury and examination of testimony, to find and determine the degree of the crime, and to give sentence accordingly.—(Act 1829, sect. 3, Laws of Tennessee, p. 316.)

MICHIGAN.

All murder, which shall be perpetrated by means of poison and lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and shall be punished with death; and all other kinds of murder shall be deemed murder of the second degree, and shall be punished by confinement in the penitentiary for life, or any term of years, at the discretion of the court trying the same.—(Rev. Stat. part 4, tit. 1, ch. 3, sect. 1.)

Murder, in the first degree, in each of the above given statutes, is first defined generally, and is then extended in such a way as to cover certain enumerated instances; it being provided that all cases not either enumerated or falling within the general definition, shall be murder in the second degree. The following table will serve to show what, in each state, is the general definition of murder in the first degree, and what the additional particular instances:

MURDER IN THE FIRST DEGREE.

	ENUMERATED INSTANCES.	GENERAL DEFINITION.
<i>Maine,</i>	Murder "in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years."	Murder with "express malice aforethought."
<i>New Hampshire, .</i>	Murder by "poison, starving, torture," or, "in the perpetration or attempt at the perpetration of arson, rape, robbery or burglary."	Murder by "deliberate and premeditated killing."
<i>Connecticut, . .</i>	Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary."	Murder committed "by any (other) kind of wilful, deliberate, and premeditated killing."
<i>Pennsylvania, .</i>	<i>Ibid.</i>	<i>Ibid.</i>
<i>New Jersey, . .</i>	<i>Ibid.</i>	<i>Ibid.</i>
<i>Michigan, . . .</i>	<i>Ibid.</i>	<i>Ibid.</i>
<i>Alabama, . . .</i>	<i>Ibid.</i>	<i>Ibid.</i>
<i>Virginia, . . .</i>	Murder committed by "poison, lying in wait, duress of imprisonment, starving, wilful and excessive whipping, cruel treatment."	Murder perpetrated "by any (other) kind of wilful, deliberate, malicious, and premeditated killing."
<i>Tennessee, . .</i>	Murder committed "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or larceny."	"Any kind of wilful, deliberate, and premeditated killing."

No question exists as to the fact of the enumerated instances in the above definitions falling within the definition of murder in the first degree, though it seems that they do not necessarily do so. Thus, where a potion was administered to a mother with intent to cause the death of a child with which she was pregnant, and the mother died in consequence, it was held murder in the second degree.¹ "Murder by poison or lying in wait," said King, President J., "are given as instances of wilful, deliberate and premeditated killing; not as cases which, under all conceivable circumstances, are to be regarded as such. When, however, a malicious homicide accompanies the perpetration or attempt to perpetrate arson, rape, robbery or burglary, the common law is left to its full operation, and the incendiary, ravisher, or burglar, if he takes life in the prosecution of the crime, is answerable capitally for its consequences, whether he did or did not intend to kill. Suppose, for instance, a quack should administer a poisonous drug, not with intent to kill, but under the honest but mistaken idea of relieving his patient; but when, from the magnitude of the dose death ensues; here would be a case of killing by poison, but not one of murder by poison; for who could regard such a case as one of wilful, premeditated, and deliberate killing? In the case before us, if savin or ergot was administered to the deceased, it was done, not with intent to destroy or permanently injure her; and it is with her murder, not with the unlawful destruction of her offspring, that the defendants are charged." It is submitted that the illustration used, of an overdose by a quack, is not quite in point. Death from such a cause would not, at common law, be "murder;" and therefore is not affected by a statute declaring that all *murder* by means of poison shall be punished by death, &c. As to the correctness of the result, however, which was arrived at by the learned court, there can be no question.

The general question of the right to find a verdict for the second degree, when the means was poisoning, arose in 1849, in Connecticut, on the following statement of facts:—The prisoners, Solomon, David, and Lucina Coleman, were charged in the indictment with the murder of Niles Coleman, the husband of Lucina Coleman, by means of poison. In the first count, it was averred, that they mixed a deadly poison called corrosive mercury sublimate, in a solution of camphor, and gave him the mixture to drink, which caused his death. In the second count, it was averred, that the death was produced by causing him to drink of a mixture of corrosive sublimate of mercury, and "certain other ingredients, to the grand jurors unknown." There were two other counts, charging them with having administered to the deceased, poison, in like manner, with intent to kill and murder. The prisoners pleaded not guilty, and were tried before the Superior Court, holden in Hartford, in 1849. The jury found them guilty of murder in the second degree. The defendants thereupon moved an arrest of judgment, upon the ground that the verdict did not answer the issue, and was such as the jury could not legally render under the indictment. The question was reserved for the advice of the Supreme

¹ Com. v. Keeper of Prison, 2 Ashmead, 227.

Court, the opinion of which was delivered by Waite, J., as follows:—
“The only question presented in this case, is, whether it was competent for the jury, upon this indictment, to find the prisoners guilty of murder in the second degree, and for the court, upon such conviction, to impose the punishment prescribed by law for that offence. Formerly, in this state, a person convicted of the crime of murder, whatever might be the attending circumstances, was liable to the punishment of death. But, in the year 1846, the legislature passed an act, in the preamble to which, they say ‘that several offences which are included under the general denomination of murder, differ so greatly from each other, in the degree of atrociousness, that it is unjust to involve them in the same punishment.’ It is, therefore, enacted, ‘that all murder, which shall be perpetrated, by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder, shall be deemed murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree.’ The statute then provides, that a person convicted of the former offence, shall suffer death; and of the latter, imprisonment for life. It is apparent, from this statute, that it was not the design of the legislature to create any new offence, or change the law applicable to murder, except so far as the punishment was concerned. The crime still remains as it was at common law, and in the more aggravated cases, the person convicted is liable to the original punishment, while others, whose crimes are less aggravated, are punished with less severity. It is a general rule that in criminal cases it is not necessary to prove all the allegations contained in the indictment, but in general, it is sufficient to prove so much of them as will constitute a substantive crime, within the jurisdiction of the court before which the trial is had, and punishable by law. Thus, upon an indictment for murder, the jury may negative the averment that the act was done with malice aforethought, and convict of the crime of manslaughter.¹ So if a person is charged with the commission of rape, he must be convicted of an assault with intent to ravish.² And if a person be indicted for an assault with intent to kill and murder, he may be convicted of an assault with intent to kill.³ In the most cases mentioned in the statute, as constituting the crime of murder in the first degree, the lesser crime is manifestly included. Thus, if the charge were, that the murder was committed by the accused while lying in wait, the jury might find that it was not so committed, and convict him only of the lesser offence. So if it were averred that the act was done by him while attempting to commit the crime of arson, or rape, the jury might find that part of the charge untrue, and still convict the person of murder in the second degree. Now, if the same rule applies to the case where the charge is for murder by poisoning,

¹ *State v. Nichols*, 8 Conn. R. 496; *King v. Hollingberry*, Call, 4 B. C. C. 329. 10 E. C. S. 346; *Rex v. Hunt*, 2 Camp. 503, 2 Russ. on Crimes, 700.

² *State v. Shepperd*, 7 Conn. R. 554. *The Commonwealth v. Cooper*, 15 Mass. Rep. 187.

³ *State v. Nichols*, 8 Conn. R. 496.

then the conviction, in this case, was legal. The language of the statute strongly favours such a construction. It provides that murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, shall be murder in the first degree; thereby implying, that in all cases the crime must be the result of a wilful, deliberate, and premeditated act. Hence, if any case can be supposed, where murder may be committed by means of poison, and not be the result of such an act, then a conviction of murder in the second degree may be legal. And we do not feel ourselves authorized to say that the case under consideration might not have been one of that description, and consequently that the verdict is not right. Indeed, we are rather inclined to consider such the fair construction of the statute, especially as it is a highly penal one, and such a construction operates against the greater severity. But, however this may be, there is another provision in the statute more unequivocal. It says that the jury, if they find the accused guilty, shall ascertain in their verdict whether it be murder in the first or second degree. And if he be convicted by confession, the court shall determine the degree of crime, by examination of witnesses. This provision is positive, without any exception or qualification, and we do not feel authorized in the construction of a statute like this, involving the life or death of the person accused, to make an exception where the legislature have made none. We are rather inclined to think that in all cases the degree of criminality must be determined as a question of fact, and that a general conviction, upon any indictment, without such determination, would not authorize a court to impose the greater punishment. It was under such an impression, that the court below, in submitting the case to the jury, informed them, that in case they should find the prisoners guilty of the offence charged against them, the statute made it their duty to determine the degree of their guilt. And the jury having so done, their verdict must stand."¹

With regard to the first class of other enumerated instances of murder in the first degree, the same observation obtains. A man may kill another by "lying in wait," when his intention was to maim, or perhaps merely to alarm. Cases of this kind have frequently occurred in practice, and one memorable instance is related by *Hitzig*, in his *Annals*. A student in one of the German universities had become an object of much dislike to his associates, who determined to seize upon his nervous susceptibility to superstitious influence, for the purpose of punishing him. Knowing that on a particular evening he was to descend into a cellar, about which there was some popular superstitious legend, several of them secreted themselves behind the stair way, and when the visiter was about to ascend, having accomplished his purpose, pinioned the end of his coat to the post by a fork, uttering, at the same time, a series of unearthly noises for the purpose of adding vivacity and effect to the delusion. The shock was too much for his nervous system, and he fell into a convulsion, which speedily terminated in death. This was undoubtedly a most reprehensible act on the part of the guilty agents,—it was certainly homicide by lying in wait—and yet, even supposing it was a case of murder at common law,

¹ *State v. Dowd*. 69 Conn. 391.

it clearly would not have been murder in the first degree. And though the case is not exactly apposite, since it would, in point of fact, have been held but manslaughter, yet, supposing a felony, such as the larceny of a tame fowl, was involved in the original intent, so that the homicide would have been positively murder at common law, yet this does not alter the result. It has, in fact, been frequently judicially declared that when a man intending to shoot a tame fowl, for the purpose of stealing it, killed its owner, it is murder in the second degree; and "lying in wait," could not make it murder in the first degree, without violating all the real distinctions of the act. It is true that Mr. Justice Daniel, in a case before the general court of Virginia, which will be presently more fully cited,¹ has intimated that in the enumerated cases, the legislature has declared the law to be that the perpetrator shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result which the will, deliberation, and premeditation of the party accused sought. This, however, is rather an opinion thrown out in the course of argument, than an express decision, for the question was not before the court; and it cannot therefore be treated as in positive conflict with the Connecticut and Pennsylvania authorities.

The same observation applies to a case in Virginia, where "wilful and excessive whipping," is among the enumerated instances, and where a verdict of murder in the first degree was sustained against a master for whipping a slave to death, though it was maintained that the intent was to do only bodily harm. It should be observed, also, that in the Virginia act, the term "*other*" is omitted before the phrase "*kind of wilful, &c., killing*," so that to some degree the bearing of the latter definition on the enumerated instances, is weakened.²

With regard to the second clause, murder "in the attempt to perpetrate any arson, rape, robbery or burglary"—and in Tennessee "larceny,"—there is at present no variation of judicial sentiment. To constitute this branch of the offence, two elements are necessary. 1st, *murder*; 2d, The intent to perpetrate the collateral felony of the class mentioned. The species of cases which fall within the general rule are in truth well known and have been the subject of frequent adjudication both here and in England.

When the jury, therefore, find that "murder,"—*i. e.* homicide, which would fall under the common law definition of murder—has been committed "in the perpetration of or attempt to perpetrate" any of the specified felonies, they have no alternative but to convict of murder in the first degree.

It has been made a question whether when a party intending to kill A. kills B., he is guilty of murder in the first or in the second degree. It is clear, as has already been seen, that at common law the offence is murder, if circumstances would have made it such if the party intended had been slain. The question was first mooted in a very early case in Pennsylvania.³ The prisoner was an honest and industrious man, but addicted to intoxication, and when in that state was

¹ *Com. v. Jones*, 1 Leigh, 610.

² *Souther v. State*, 7 Grat. 678.

³ *Com. v. Dougherty*, 7 Smith's Laws, 695.

quarrelsome. It also appeared that his wife occasionally drank too much; and on the day of the fatal occurrence they had fallen into a drunken squabble. During the quarrel the wife threw several stones at him, one of which struck him on the arm. A few moments after they were seen struggling together, but soon after the wife was discovered fleeing with her infant in her arms, the prisoner pursuing her with an axe in his hand. When he came within reach of her he aimed a blow at her which fell on the head of the child as it lay upon the wife's shoulder, and caused a mortal wound, of which the child died. The prisoner soon recovered himself and showed many signs of repentance, and manifested much distress at the manner of the child's death. Rush, P. J., a respectable though severe judge, who tried the case, in the course of his charge to the jury, said, "We now come to this point:—what was the intention of the prisoner in the bar, when he killed Daniel Dougherty, his child? for, if his intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree; as much as if he had prepared a cup of poison for his wife and his child had drunk it. You, however, are in this case to judge of the law and facts. If you are of the opinion the injury the prisoner received from his wife throwing stones at him, and hitting him, kept his passion boiling until he gave the fatal blow, we think it your duty to find him guilty of manslaughter. But if you are of the opinion his passion had time to cool, or in fact had cooled, after the assault on him by his wife, it is your duty to convict him of murder in the first degree." The verdict was manslaughter. In this case, as will be observed, the verdict having been manslaughter, and no opportunity having existed of revising the charge, the authority of the case is limited by the fact of its having been made in the hurry of *Nisi Prius*, and by a single judge. Such also is the case with a subsequent charge in the same court where the same point was announced by Judge Parsons.¹

More recently, however, a contrary opinion has been asserted by the Supreme Court of Tennessee, upon careful consideration. In this case, the defendant, when aiming at the prosecutor, shot the prosecutor's wife, and M'Kinney, J., in delivering the opinion of the court, said, "The plaintiff in error was indicted in the circuit report of Giles County, for the murder of Mary Jane Wilsford; and was found guilty by the jury of murder in the first degree, as charged in indictment. The jury also found that there were mitigating circumstances in the case. The prisoner moved the court for a new trial, but the motion was overruled, and judgment pronounced, that he undergo confinement in the jail and penitentiary house of this state, for and during the period of his natural life. A bill of exceptions, setting forth the proof in the case, was signed and sealed, and an appeal in error prosecuted to this court. Upon a careful consideration of the proof, we feel constrained to say, that the facts of the case, as presented in the record before us, furnish no sufficient ground, in our judgment, for disturbing the verdict of the jury. It, therefore, only remains to inquire, whether or not the legal principles applicable to the facts of the case, were correctly stated to the jury, in the charge of the

¹ *Com. v. Flavel*, Mss. 1846.

court. The deceased was the wife of the prosecutor, and her death was caused by a pistol shot, discharged by the prisoner. It seems to have been a question, earnestly discussed on the trial in the Circuit Court, as well as in the argument here, whether the shot, which resulted in the death of Mrs. Wilsford, was intended by the prisoner to take effect upon her or the prosecutor. In reference to this question, the judge instructed the jury that, "if the defendant intended to kill the husband of the deceased, and undesignedly killed the deceased, the offence would be the same as if he had killed the husband; that is, if the defendant had killed the husband of the deceased, and such killing would have been excusable homicide, in self-defence, as already explained to you, then you should acquit the defendant; and so if he had killed the husband of the deceased, under such circumstances as would make the offence manslaughter, or murder in the first or second degree, as already explained to you; then, though he undesignedly killed the deceased, it would be the same offence as if he had killed the husband of the deceased, and you should fix the punishment of the defendant accordingly." The only question presented upon the record is, whether the principle announced in the foregoing instructions, is applicable to the crime of murder in the first degree, as defined in the third section of the penal code of 1829. That this principle is correct in reference to murder at the common law, is conceded, and that it is equally so, as respects murder in the second degree, and all the inferior grades of homicide under the statute, is not to be questioned. But that it is wholly inapplicable and directly opposed to both the letter and spirit of the statute, as regards murder in the first degree, we think is clearly beyond doubt. In order to a correct determination of this question, we are to inquire what was the intention of the legislature? What change of the existing law, upon this subject, was contemplated by the statute? What particular evil was designed to be obviated, or at least alleviated? The common law, which was in force here prior to the statute of 1829, recognises no distinction in respect to felonious homicide, except that between murder and manslaughter; the act in the latter offence, being rather imputed to the infirmity of human nature. In regard to the latter crime, a distinction, certainly reasonable and just in itself, was also taken between voluntary and involuntary manslaughter. But in relation to the higher crime of murder, the common law made no discrimination; all murders, irrespective of their greater or less malignity and atrocity, were, so far at least as respects the punishment, on the same footing. And, without regard to the intrinsic nature of the case, or circumstances tending to enhance or extenuate its legal, as well as moral guilt, the uniform and indiscriminate punishment was death. With a discrimination more conformable to the dictates of reason, justice, and humanity, as well as to the spirit of the age, the penal code of 1829, had in view, among other objects, the admeasurement and adaptation of punishment to the different degrees of crime, according to their different degrees of malignity, as far as comported with the public safety and policy. In the accomplishment of this purpose, the crime of murder (the definition of which, contained in the second section of the statute, is borrowed in exact terms from the common law) is divided into two

grades, with a view solely to the graduation of the punishment. The third section enacts that, "all murder that shall be perpetrated by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree." In this general definition, and enumeration of specific instances constituting murder in the first degree, there is a classification of various kinds of homicide, which it may be of some importance to notice, with a view to the question under consideration. In cases of murder by means of poison, or lying in wait, the most atrocious and detestable of all kinds of homicide, and the least to be guarded against, either by resistance or forethought, the crime is made to depend exclusively upon the "means" causing death. So, likewise, in respect to cases of murder committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary, or larceny; a class of felonies most dangerous in their consequences to public safety and happiness, which may be most frequently and easily committed, and to which there is the strongest temptations. In all these cases, the mode or "means" of destroying life, supplies a conclusive legal presumption of malice and guilty intention; the crime, as well as the guilt of the agent, is made to depend alone upon the fact of taking life in either of the specified modes. In such cases the question of malice or intention, as a matter of fact, is wholly irrelevant; it need not be proved, and cannot be controverted by the accused. But the remaining species of murder defined in the statute, namely, murder "by any other kind of wilful, deliberate, malicious, and premeditated killing," falls within the operation of a directly contrary principle. Here, the character of the crime and guilt of the agent, are made to depend exclusively upon the mental status, at the time of the act, and with reference to the act which produces death. This accumulated definition of murder in the first degree, takes in all the ingredients of crime descriptive of the utmost malignity and wickedness of heart, as well as of the highest and most aggravated species of homicide. If the universal principle of construction is to be regarded, that every word in a statute is to have meaning and effect given to it, if practicable, it results of necessity, by force of the terms employed in the definition of the crime, that to constitute murder in the first degree, it must be established that there existed in the mind of the agent, at the time of the act, a specified intention to take the life of the particular person slain. The characteristic quality of this crime, and that which distinguishes it from murder in the second degree, is the existence of a settled purpose and fixed design on the part of the assailant, that the act of assault should result in the death of the party assailed; that death being the end aimed at, the subject sought for and wished.¹ The "killing" must be wilful, that is, of purpose, with the intent that the act by which the life of a party is taken, should have that effect.² "Proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result

¹ 4 Hump. 136, 139.

² Yerg. 551.

which the concurring will, deliberation and premeditation of the party accused, sought.”¹ If, then, by misadventure or other cause, a blow, directed at a particular person and designed to take his life, take effect upon, and cause the death of a third person, against whom no injury was meditated, can it be said, that the will concurred with the act, which resulted in the accidental death of such third person; or that there existed a specific intention to take his life? A grosser absurdity cannot be conceived. The hypothesis that the killing was undesigned, concedes that the will did not concur with the act; that in point of fact no such specific intention existed, no such lawsuit was either contemplated or designed. And upon what principle is it, that this would be murder at common law? Simply upon the principle of implied or imputed malice and intention. In such case, all the essential elements of murder at common law occur. A homicide has been committed with deadly weapon, in the attempt to perpetrate a felony, by taking the life of another person without legal justification as excuse, and in such case, from the circumstances and deadly weapon, the law conclusively presumes malice and intent to murder; and in like manner, the law conclusively presumes that the party contemplated the consequences of his own act. There is another principle applicable in such cases, namely, the law by imputation, so to speak, refers the act of murder to the felonious intent existing in the mind of the agent toward the principal object of his revenge. “Thus,” says Blackstone,² “if one shoots at and misses A., but kills B., this is murder; because of the previous felonious intent, which the law transfers from the one to the other.” But we have seen that murder in the first degree, as constituted by our statute, depends upon the existence of a specific intention to take the life of a person slain, and that the existence of such an intention as a matter of fact, must be satisfactorily established. Hence it is clear to a demonstration, that all legal implication or imputation of such an intention, is excluded in reference to this particular species of murder. It is equally clear that all cases of homicide, not falling within the principles here announced, properly belong to the comprehensive class, included in the statute, of “all other kinds of murder,” which are declared to “be deemed murder in the second degree.” To murder of this class, as well as to all inferior grades of homicide, the common law principle, asserted in the charge of the circuit judge, is clearly applicable. We are aware, that in Pennsylvania, upon a statute almost identical in its terms with our own, a different construction has prevailed. In the case of the *Commonwealth v. Dougherty*, it appears, from the note of the case, to which only we have had access, that the prisoner aimed a blow with an axe at his wife, and it fell upon the head of a child which lay on her shoulder, and inflicted a mortal wound, of which it died. And it was held by the Court, that if the person’s intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree. With deference to an authority so respectable, we think it very clear, that no such conclusion can be legitimately deduced from the premises. We regret that we have not seen the opinion at length, in the case

¹ 1 Leigh’s Rep. 611.

² 4 Bl. Com. 261.

above mentioned. The brief extract before us, merely asserts the proposition we have quoted; the process of reasoning by which the conclusion is supposed to be maintained is not given in the note. We confess ourselves at a loss to understand in what sense it can be predicated of the act of the prisoner in "killing his child," that it was wilful, deliberate, and premeditated, and more especially, how it can be made out that the will concurred with the act in such case. The contrary construction, we think, is alone compatible with the plain terms of the statute, whether we regard their proper or popular acceptance; with the obvious spirit of the statute, which was to alleviate the punishment of murder, except in cases of the greatest enormity; with the benignant principle of interpretation, that, in favour of life a statute is to be construed most favourably in behalf of the accused, and most strictly against him, and finally with that intrinsic and fundamental distinction, in respect to the relative guilt of human actions, dependent upon the concurrence and non-concurrence of the will, which we trace back as far as the Jewish dispensation, under which cities of refuge were provided to the end, "that every one that killeth any person unawares may flee thither, and be secure from the avenger of blood."¹

We now proceed to the consideration of the general definition of murder in the first degree, within which, in fact, most of the cases fall. By the Pennsylvania act, and by those which are directly copied from it, it is declared that murder committed "by any *other* kind of *wilful, deliberate, and premeditated* killing," shall be murder in the first degree.

The first question that here arises is as to the meaning of the word "other." It has been frequently argued, and still is, that "other" in this sense means, *such* other. This question is fully discussed in the opinion of Mr. Justice Daniel, which has been already referred to. "The counsel for the prisoner," he said, "has supposed, and argued in support of his supposition, that the words 'any other kind of wilful, deliberate, or premeditated killing,' ought to be construed, and of necessity, as referring to the character or kind of killing, or murder specified in the previous enumeration, (by means of poison, lying in wait, duress of imprisonment or confinement, starving, wilful, malicious, or excessive whipping, beating or other cruel torture,) as if it read, 'any other kind of such wilful, deliberate or premeditated killing;' because, otherwise, as he supposes, the preceding particular enumeration would be useless. Now, a plain and invincible answer to this argument, is the import of the terms used; other and such. Other killing, means any other whatever, which is different from the same; such killing would refer to the modes of killing enumerated, and confine itself to the kind of killing enumerated, and the means by which it was effected. To admit this construction of the prisoner's counsel, would be to allow that the legislature meant nothing, or did not understand what it meant, when it used, upon this very important subject of life and death, those words of plain and obvious import, 'any other kind of wilful, deliberate and premeditated killing.' This is what this court cannot admit. Poison may reach the life of one or more not within

¹ Bratton v. State. 10 Humph. 103.

the design of him who lays the bait; lying in wait, may be with a view of great injury, abuse and bodily harm, without the settled purpose to kill; imprisonment or confinement, or starving, may be with a view to reduce the victim to the necessity of yielding to some proposed conditions, as well as a punishment for the failure of prompt obedience, without any fixed determination to destroy life; and the same may be said of malicious or excessive whipping, beating, or other cruel torture. In all these enumerated cases, the legislature has declared the law, that the perpetrator shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result which the will, deliberation, and premeditation of the party accused sought. And the same authority has declared the law, that any other kind of killing, which is sought by the will, deliberation, and premeditation of the party accused, shall also be murder in the first degree; but as to this other kind of killing, proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused, sought. But to this general rule the same authority adds an exception, which is, that any death consequent upon the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree: and all other murder at common law, shall be deemed murder in the second degree. So that the cases within the exception, as now put, and the cases enumerated as first mentioned, are, in fact, placed upon the same principle; there is no necessity of proof in either, to establish the fact that a homicide was intended. And it follows, of course, that all other homicide which was murder at common law, is now murder in the second degree, except when it shall be proved that the homicide was the result of a 'wilful, deliberate, and premeditated killing;' and it also follows, of necessity, that, when by the proof the mind is satisfied that the killing was wilful, deliberate, and premeditated, such killing must be taken and held to be murder in the first degree."¹

Supposing then that the act reads, "any kind of wilful, deliberate, and premeditated killing," the inquiry arrives as to the general meaning of this last clause. According to the settled rule, for the construction of penal statutes, "killing," to be murder in the first degree, must possess each of the features here conjunctively stated. It must be (1) wilful, (2) deliberate, and (3) premeditated. The distinctive points of these terms it is not easy accurately to determine, though from their being used copulatively, it is proper to suppose that they are to be read, not as representing the same, but distinct inflections of meaning. Viewed in this light, we may define *wilful* as involving the element of individual intent; *deliberate*, that of calmness as distinguished from passion; and *premeditate*, that of prior consideration, as distinguished from instantaneousness.

(1.) Wilful. The doubt which arises from the use of this term, has already been noticed. Can an *unintended* act be said to be wilful, and if so, can the homicide of one party when another was intended, be such? It has been seen that on this point, there exists some conflict of authority. Keeping in view the severity which the construction of a penal statute requires, and recollecting that the term as used in this

¹ Com. v. Jones, 1 Leigh, 610.

case was meant to be restrictive, the better view seems to be that in order to bring a homicide within the act, it must have been specially *willed* by the perpetrator. It is difficult to see how if homicide of an unintended person be within the act, any other kind of murder with a collateral felonious intent can be excluded.

(2.) Deliberate. That species of homicide, which is the result of justly provoked passion, falls at common law under the head of manslaughter, and of course is out of the question here. But there are many cases of murder at common law, which are *indeliberate*. Putting aside homicides perpetrated in pursuance of a collateral felonious intent, which have already been considered, we have those cases where the intellect is so confused by drink or stimulus, or by undue, and yet not homicidal passion, as to be incapable of deliberation. These cases are all murder at common law, but it would seem that they want the essential features of deliberation to make them murder here.

Intoxication, when existing to a sufficient extent to prevent deliberation, lowers the offence to the second degree.¹ "Except in the case of murder, which happens in consequence of actual or attempted arson, rape, robbery or burglary," says Judge Lewis, now of the Supreme Court of Pennsylvania, "a deliberate intention to kill is the essential feature of murder in the first degree. When this ingredient is absent, where the mind from intoxication, or any other cause, is deprived of its power to form a design, with deliberation and premeditation, the offence is stripped of the malignant features required by the statute to place it on the list of capital crimes; and neither courts nor juries can lawfully dispense with what the act of assembly requires."²

And so in a recent case in Tennessee, Green, J., said, "Upon the trial, there was evidence that the prisoner was intoxicated at the time he committed the homicide." Upon the subject of the defendant's intoxication the judge told the jury, that "Voluntary intoxication is no excuse for the commission of crime; on the contrary, it is considered by our law as rather an aggravation; yet if the defendant was so deeply intoxicated by spirituous liquors at the time of the killing, as to be incapable of forming in his mind a design deliberately and premeditatedly to do the act, the killing under such a state of intoxication, would only be murder in the second degree." It is insisted that his honour did not state the principle upon this subject, as it has been ruled by this court. In the case of *Swan v. The State*,³ Judge Reesc, who delivered the opinion of the court, says: "But although drunkenness in point of law constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made to depend by law, upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental status? Is it one of self-possession, favourable to a fixed purpose, by deliberation and premeditation, or did the act spring from existing passion, excited by inade-

¹ *Com. v. Jones*, 1 Leigh, 612; *Com. v. Haggerty*, Lewis, C. L. 403; *Pirtle v. State*, 9 Humph. 664.

² *Lewis C. L.* 405.

³ 4 Humph. R. 136.

quate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits? In such case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is did the act proceed from sudden passion, or from deliberation or premeditation? What was the mental status at the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, it is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes, has been in point of fact committed. In these remarks the court intended to be understood, as distinctly indicating, that a degree of drunkenness by which the party was greatly excited, and which produced a state of mind unfavourable to deliberation and premeditation, although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury, in determining whether the killing was done with premeditation and deliberation. The whole subject was ably reviewed by Judge Turley, in the case of *Pirtle v. The State*.¹ In delivering the opinion of the Court, in that case, the Judge says, at page 671: "It will frequently happen necessarily, when the killing is of such a character as the common law designates as murder, and it has not been perpetrated by means of poison, or by lying in wait, that it will be a vexed question, whether the killing has been the result of sudden passion produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of premeditation and deliberation; and in all such cases whatever fact is able to cast light upon the mental status of the offender is legitimate proof: and among others, the fact that he was at the time drunk; not that this will excuse or mitigate the offence, if it were done wilfully, deliberately, maliciously, and premeditatedly; (which it might well be, though the perpetrator was drunk at the time,) but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat, to the point of taking life, without premeditation and deliberation." Here, the court explicitly lays down the rule to be, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprang from a premeditated purpose, or from passion excited by inadequate provocation. And the degree of drunkenness which may then shed light upon the mental state of the offender, is not alone that excessive state of intoxication, which deprives a party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act; for the court says that in the state of drunkenness referred to, a party well may be guilty of killing wilfully, deliberately, maliciously, and premeditatedly; and if he so kill, he is guilty as though he were sober. The principle laid down by the court is, that when the question is, can drunk-

¹ 9 Hum. Rep. 663.

eness be taken into consideration, in determining whether the party be guilty of murder in the second degree, the answer must be, that it cannot, but when the question is, what was the actual mental state of the perpetrator, at the time the act was done, was it one of deliberation and premeditation, then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connexion with all the other facts and circumstances, whether the act was premeditatedly, and deliberately done. The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case it is murder, though the perpetrator were drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness be caused. The law in such cases, does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which it is implied having been proved, the law presumes its existence, and proof in opposition to this presumption, is irrelevant and inadmissible. Hence a party cannot show he was so drunk, as not to be capable of entertaining a malicious feeling. The conclusion of law is against him. But when the question is, whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion as to the actual state of mind with which this act was done. All murder in the first degree, (except that committed by poison, and by lying in wait,) must be perpetrated wilfully, deliberately, maliciously, and premeditatedly. The jury must ascertain as a matter of fact, that the accused was in this state of mind when the act was done. Now according to the cases of *Swan v. The State*, and *Pirtle v. The State*, any fact that will shed light upon this subject, may be looked to by them, and may constitute legitimate proof for their consideration. And among other facts, any state of drunkenness being proved, it is a legitimate subject of inquiry, as to what influence such intoxication might have had upon the mind of the offender, in the perpetration of the deed. We know that an intoxicated man will often, upon a slight provocation, have his passions excited, and rashly perpetrate a criminal act. Now, it is unphilosophical for us to assume, that such a man would in the given case be chargeable with the same degree of premeditation, and deliberation, that we would ascribe to a sober man, perpetrating the same act upon a like provocation. It is in this view of the question, that this court held, in *Swan's case*, and in *Pirtle's case*, that the drunkenness of a party might be looked to by the jury, with the other facts in the case, to enable them to decide whether the killing were done deliberately and premeditatedly. But his Honour, the circuit judge, told the jury, that drunkenness was an aggravation of the offence, unless the defendant was so deeply intoxicated, as to be incapable of forming in his mind a design deliberately and premeditatedly to do the act. In this charge there is error, for which the judgment must be reversed. Reverse the judgment, and remand the cause for another trial."¹

Excitement or passion, though not of a character to lower the offence to manslaughter, may yet operate to bring it to the second de-

gree. A striking illustration of this is to be found in the riot cases tried in Philadelphia, in 1844, and which are fully reported in the appendix.¹ It was there held by a very able judge, that where bodies of men are labouring under continued fresh excitement, and under its influence arm themselves, and when death ensues, the offence is murder in the second degree. And of this a sound test is the time when the deadly weapon was seized. If it was sought when the mind was cool, in pursuance of a revengeful purpose, it is conclusive as to deliberation. If, on the other hand, it was snatched up during the period of excitement, or passion, no matter whether that period was long or short, there is a strong presumption in favour of the milder grade.

(3.) *Premeditate*. It is here that the most difficult questions arise. It has been said that a positive previous intent to take life must be shown,² but this opinion has since been recalled by the court that delivered it,³ and is opposed to the weight of authority elsewhere. And it has also been said that when the fact of death alone is proved, the presumption is that it is murder in the second degree, it being incumbent on the prosecution to rebut this by something, however slight, from which premeditation can be inferred.⁴ But be this as it may—and when analyzed the position varies very little from that of the crown writers on murder, who draw the presumption of malice aforethought, not from the fact of death, but from the nature of the wound, instrument, &c.—there is a general concurrence of authority on the general meaning of *premeditation*. It involves a prior intention to do the act in question. It is not necessary that this intention should have been conceived for any particular period of time. It is as much premeditation, if it entered into the mind of the guilty agent a moment before the act, as if it entered into it ten years before.⁵ And

¹ See also ante, 350-3.

² *Mitchell v. State*, 5 Yerger, 340.

³ *State v. Andrews*, 2 Tenn. 6; *Dale v. State*, 10 Yerg. 551.

⁴ *Hill's case*, 2 Gratt. 594. *State v. Turner*, Wright, 30.

⁵ This is very lucidly shown in a late case in New York, where the learned judge delivering the opinion of the court, said, "Malice prepense, however, had attained a broader meaning than belongs to the term premeditated design. The intent to take life was not necessary to constitute malice prepense. Even express malice, or malice in fact, is defined to be a deliberate intention of doing *any* bodily harm to another, unauthorized by law (Hale, P. C., 451,) and by no means necessarily involved an intent to take life. The change, therefore, which the statute has effected, by substituting the word design in place of malice, is not to alter the nature or design of premeditation requisite in the crime of murder, but to require,—which the common law did not require,—the existence of an actual intention to kill, to constitute that crime under the first sub-division of the 5th section. This view of the law is well sustained by the decisions in those states where the crime of murder has been distinguished by statute, into murder, in the 1st and 2d degrees. In those states, wilful, deliberate and premeditated killing, is murder in the 1st degree. The cases are very ably reviewed in Wharton's Am. Crim. Law, (2d Ed.) pp. 420 and seq., and the clear result of them is, that in cases of deliberate homicide, where there is a specific intention to take life, the offence, if consummated, is murder in the 1st degree. The degree of deliberation is not different from that required by the common law. As was said by Chief Justice McKean in *Res. v. Bob*, 4 Dul., 146, "the intention remains as much as ever the true criterion of crime in law as well as in ethics. Let it be supposed that a man without uttering a word should strike another on the head with an axe, it must on every principle by which we can judge of human actions be deemed a premeditated violence." If there be a sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contem-

the reason of this is obvious. In the first place, if in order to make murder in the first degree it be necessary the idea should have been conceived a week or a day ahead, there will be no murder in the first degree at all, for the guilty party will take care that the conception be concealed until the limitation is passed. In the second place, all psychological investigation shows that the process of conception is instantaneous, and that it knows no adolescence or minority. Under these views, and inasmuch as it is necessary that a line should be drawn somewhere, and as the most proper place for it to be is at the root of the evil, the courts have generally united in holding that while there must be some sort of *pre-meditation*, (i. e., the blow must not be the incident of mania or a sudden paroxysm of passion, such as destroys the intellectual powers,) a moment is as sufficient to complete the offence as a year.

The inference of *premeditation* from the use of a fatal weapon, was drawn very forcibly by Chief Justice McKean, in the earliest reported Pennsylvania case. It appeared that a considerable number of negroes assembled; and about ten o'clock at night a quarrel arose between mulatto Bob, the prisoner at the bar, and negro David, the deceased. For awhile, the parties fought with fists; and the prisoner was heard to exclaim "enough!" The affray, however, became general, and continued so for some time. When it was over, the prisoner went to a neighbouring pile of wood, and furnished himself with a club. He was advised not to use it, but he declared that he would, and entered the crowd with it in his hand. After remaining there about ten minutes, he left the crowd without his club; and, again repairing to the wood-pile, took up an axe. Being, likewise, dissuaded from returning to the crowd with the axe, he said "he would do it;" and striking the instrument, with great passion, into the ground, swore that he would "split down any fellows that were saucy." Accordingly, he mixed once more among the people; a struggle was immediately heard about the axe; the prisoner then struck the deceased with it on the head; the deceased fell; and as he was attempting to rise, the prisoner gave him a second blow on the head with the sharp edge, which penetrated to the brain. After languishing three days, death was the consequence of this wound. "From these facts," said the chief justice, in summing up the evidence, "we are to inquire what crime the prisoner has committed? Murder, in the first degree, is the wilful, deliberate, and premeditated killing of another. There are various inferior kinds of homi-

plated for months. It is enough that an intention precedes, the act follows instantly. The law has no favour to extend either to rapid or close execution of such a design. In the case before us, there was no provocation, no mutual combat, no heat of passion which the law can recognise—for outbursts of ungovernable passion do not excuse a man for any acts of atrocity he may commit under their influence; men are bound to control their passions, and if they suffer them to run away with their reason and senses, they ought to suffer for it." *State v. Spencer*, 1 Bab. 206. We cannot discern a single circumstance which tends in any degree to soften one feature of the atrocity of the defendant's crime. Intending to take his victim's life, the defendant beat him upon the head with a deadly weapon, until his design was accomplished. This crime is, by our laws, murder; and we are well satisfied not only that this is the law, but that it could not be relaxed so as to exclude such cases as the present, without substantially diminishing the security of human life. *Johnson, J., People v. Clark*, N. Y. Ct. of Appeals, 11 N. Y. Leg. Obser. 22.

cide; but, on the present indictment, our attention is confined to a consideration of the highest and most aggravated description of crime. Then, let us ask, did the prisoner wilfully kill the deceased? It is not pretended that there was any accident in the case; and, therefore, the act must have been wilful. Was the killing deliberate and premeditated? or was it the effect of sudden passion, produced by a reasonable provocation? There had been a combat with fists; but this was over, when the prisoner, without any new provocation, first procured a club, and losing that weapon, afterwards armed himself with an axe. It cannot surely be thought that the original combat was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled by a battery more violent; but the life of a fellow creature must not be taken, unless in self-defence. It has been objected, however, that the amendment of our penal code renders premeditation an indispensable ingredient, to constitute murder of the first degree. But still, it must be allowed, that the intention remains, as much as ever, the true criterion of crimes, in law, as well as in ethics; and the intention of the party can only be collected from his words and actions. In the present case, the prisoner declared, that he would 'split the skull of any fellows who should be saucy;' and he actually killed the deceased in the way which he had menaced. *But, let it be supposed, that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a pre-meditated violence.* The construction which is now given to the act of assembly, on this point, must decide whether the law shall have a beneficial or a pernicious operation. Before the act was passed, the prisoner's offence would clearly have amounted to murder; all the circumstances implying that malice, which is the gist of the definition of the crime at common law: and if he escapes with impunity under an interpretation of the act different from the one which we have delivered, a case can hardly occur to warrant a conviction for murder in the first degree. Tenderness and mercy are amiable qualities of the mind; but if they are exercised and indulged beyond the control of reason and the limit of justice, for the sake of individuals, the peace, order, and happiness of society, will inevitably be impaired and endangered. As far as respects the prisoner, I lament the tendency of these observations: but as far as respects the public, I have felt it a sacred duty to submit them to your consideration." The jury rendered a verdict of guilty of murder in the first degree.¹

In a case occurring shortly afterwards in Virginia, it appeared on trial, that about nine o'clock of the morning on which the homicide was committed, the prisoner and the deceased were seen together in the streets of Dumfries, as if about to engage in a personal conflict, but before any blow they were separated. They had both remained in town from that time until between one and two o'clock of the same day, but how employed, it did not appear; about the latter hour, the prisoner was seen passing a tavern on the street, about four

¹ R. v. Mulatto Bob, 4 Dall. 145.

hundred yards distant from the spot where the murder was committed, and, on being accosted by the witness, who was in the said tavern, he said he had been much injured by a man, whose name he knew not, who had kicked him in the face; and the witness saw on the side of prisoner's nose, a fresh wound, from which the skin had been abraded to the superficial extent of a fourpence half-penny, or ninepenny piece. The prisoner seemed angry, and said he was determined to kill the man who had thus injured him. He then proceeded on about thirty yards further, to the house of a butcher, who was then at dinner, told her that her father (who was also concerned with her husband in the trade of a butcher,) had sent him to borrow her husband's butcher knife, which she immediately delivered to him. The shop where this took place, was about four hundred and thirty yards from that where the murder was committed. Upon his return, in about five or six minutes, from the last mentioned shop, with the knife in his hand, as he was passing the tavern before mentioned, a short conversation took place between him and the first mentioned witness, in which he reiterated his intention to kill the deceased, and was warned against the act by the witness. He proceeded along the same street about three hundred yards farther and stopped at the ware-room of a merchant, where he asked the young man who was in attendance, for a steel to sharpen the butcher's knife, declaring his intention to kill the man who had injured him. About twenty yards from the ware-room he turned into a cross street, and was heard denouncing loud threats of vengeance against the deceased, and declaring his intention to kill him. At the further corner of the first square, after entering the cross street, the prisoner found the deceased on the steps of a house, with his head hanging on his breast, apparently asleep. He roused the deceased by kicking him, and as the deceased, who was unarmed, and made no attempt at resistance, rose, the prisoner said he had come to kill him, and as the deceased answered that "he reckoned no man wanted to kill him," the prisoner thrust the butcher's knife into the breast of the deceased. The deceased cried out, "You have stabbed me," and the prisoner replied, "Damn you, if you don't hush, I will put the knife into you again." The deceased walked about one hundred and fifty yards, fell, and expired. The prisoner immediately going into a shop where he had a bundle, took it up, and walked quietly out of town to a house about two miles distant, where he was domesticated. To the owner of this house he related the incidents, and said he had given the deceased his death wound, and would keep out of the way some days, until he could ascertain whether or not he was dead. The prisoner and the deceased were both labourers. It was proved that the deceased was a turbulent man, and reputed a hard fighter. Nothing was said of the character of the prisoner. It did not appear that they had ever been together until the day preceding the death, when they were at a cock-fight; but whether they had any association there, did not appear. At the time of the murder, the prisoner either did not know, or had forgotten the name of the deceased. Under the charge of the court a verdict of murder in the first degree was rendered.¹

¹ *Burgess v. Com.* 2 *Virg. Cases*, 484.

In another case under the Pennsylvania act, which was tried before the Court of Oyer and Terminer of Philadelphia county, which is reported in full in the appendix to this chapter, it appeared that the prisoner was an honest and industrious man, but addicted to intoxication, and when in that state was quarrelsome. It also appeared that his wife occasionally drank too much; and that on the day of the fatal occurrence they had fallen into a drunken squabble. During the quarrel the wife threw several stones at him, one of which struck him on the arm. A few moments after they were seen struggling together, but soon after the wife was discovered fleeing with her infant in her arms, the prisoner pursuing her with an axe in his hand. When he came within reach of her he aimed a blow at her which fell on the head of the child as it lay upon the wife's shoulder, and caused a mortal wound, of which the child died. The prisoner soon recovered himself and showed many signs of repentance, and manifested much distress at the manner of the child's death. The learned judge who tried the case, in the course of his charge to the jury, said: "We now come to this point;—what was the intention of the prisoner in the bar when he killed Daniel Dougherty, his child? for, if his intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree; as much as if he had prepared a cup of poison for his wife, and his child had drank it. You however are in this case to judge of the law and facts. If you are of the opinion the injury the prisoner received from his wife throwing stones at him, and hitting him, kept his passion boiling until he gave the fatal blow, we think it our duty to find him guilty of manslaughter. But if you are of opinion his passion had time to cool, or in fact had cooled, after the assault on him by his wife, it is your duty to convict him of murder in the first degree. The verdict was manslaughter.¹

Shortly afterwards, in the same court, Richard Smith and Ann Carson were tried for the murder of John Carson. It appeared from the evidence, (which, with the charge of the court, is reported in the appendix to this chapter,) that the deceased had been married about fifteen years to the defendant, Ann Carson, and had lived with her the first eleven years of their marriage, but after that period had left the country, and had not been heard from, as was alleged on the part of the defendants, till a short time before his decease. In the meantime, the defendant Carson, believing or pretending to believe that her husband was dead, married the defendant Smith; Carson however returned, and finding the defendant Smith in possession of his marital rights, a quarrel ensued, which was, however, temporarily adjusted. On the seventeenth day of January the prisoner and the deceased dined together at the house of the latter, on which occasion Carson got enraged, at seeing the prisoner assume the direction of his children and his servants, and seizing a knife, made an attempt to strike Smith, who laid hold of his arm, on which the deceased, with the other hand, took up another knife. Smith fled down the stairs, pursued by Carson, with the two knives in his hands. The evening of the same

¹ Com. v. Dougherty, 7 Smith's Laws of Penn. 695.

day the prisoner was seen in the kitchen with a pair of pistols, one of which was loaded, and it appeared that he then declared, that if Carson should enter the door to lay hands on him, he would shoot him. On the following Saturday evening the prisoner came to the house of Carson, and found several persons there, among whom was Jonathan B. Smith, of whom the prisoner demanded a pistol, but was refused. Mrs. Carson then said, “Let us go, you know where there is one.” The prisoner swore that if Carson attempted to touch him he would kill him. Immediately after this the prisoner went up stairs, and went into the parlour, where he found John Carson, Mrs. Carson, and several other persons. John Carson got up, and told Smith he had come to take peaceable possession of his house, that out of the house he must go. The prisoner then said, “Very well,” and turning to Mrs. Carson, said, “Ann, shall I go?” who replied, “No, stay.” The prisoner then went to the north-east corner of the room, and Carson following him, told him several times he must leave the house. Carson had nothing in his hands. Upon this, Smith drew a pistol from under his coat, and shot Carson in the mouth, and throwing the pistol on the floor, ran down stairs. It was further in evidence, that Smith might have left the corner in the parlour without running against any body. The learned judge who tried the case charged the jury, that the second marriage was invalid, that there had been ample cooling time since the first quarrel, that as a principle of law, no affront, by word or gesture, would extenuate a homicide, and that a single moment’s deliberation was sufficient to constitute premeditation, under the act of assembly. Applying such a view of the law to the facts of the case, he charged them that the offence, if any thing, was murder in the first degree; and a verdict in accordance with the charge of the court as to the defendant Smith, being rendered, he was subsequently executed.¹

A verdict of murder in the first degree in Pennsylvania, was supported by the court, where it appeared that on the evening of the fatal occurrence, Sutcliffe, the deceased, was sitting with his infant in his arms, while his wife was preparing supper, when a knock was heard at the door, (at the back part of the room which opened upon the commons,) and Felix Murray, the defendant, entering, asked if the painter was in. Having been affirmatively answered, he sat down with a wheelbarrow strap in his hand. Sutcliffe handed his infant to his wife; a third person entered with a club, immediately struck Sutcliffe over the head with the club, and Murray beat him with the buckle end of the strap. The wife of the deceased, with her infant in her arms, fled, and falling through the window into the cellar, brought assistance. When she came back the assailants had disappeared, but Sutcliffe was found in a state of great danger, and shortly afterwards died in consequence of the wounds thus received. In the course of his opinion on a motion for a new trial, Judge King said: “This comprehends the great distinguishing feature between the law of homicide in the two codes, and perhaps the sole one. The existence of the intention to kill is always, of course, a question of fact for the jury; often, however, free from difficulty, but some-

¹ Com. v. Smith, 2 Wheeler’s C. C. 70; 7 Smith’s Laws, 696, post, Appendix.

times delicate and embarrassing. When the homicide is committed with a weapon deadly in its character, such as a loaded pistol, a sword, a sharp axe, or other similar instrument of deadly violence, the fatal intention of the perpetrator presses on the mind with irresistible force. It is when an instrument of more equivocal kind is used, that the difficulty, supposed to exist in this case, arises, and the duty of the jury becomes increased in importance and complication. But nevertheless, where the defendant pleads not guilty, it is the duty of the jury to ascertain it; for the act of 1794 directs that 'the jury before whom any person indicted for murder is tried, shall, if they find the person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree.' The court, in their charge in this case, carefully and fully explained the distinction of the degrees of murder; expounded to the jury their duties in discriminating between these degrees; referred to the act of assembly creating them, and the principles of the different judicial decisions under it; giving to the accused every advantage imparted by either. Their charge, in this particular, was all that the prisoner's counsel could have, or did anticipate. The jury, comprising some of our most valuable and intelligent citizens, aided by all the lights the experience of the court could furnish as to the law of the case; for as to the facts, they were left wholly uninfluenced; cautioned repeatedly and earnestly against yielding to the excitement which the murder of an unoffending man at his own hearth-stone, was calculated to produce, with the principles of the law expounded most favourably to the accused, have come to a conclusion adverse to him. Admitting the court to possess the authority to revise their decision, still, the exercise of such a power should be influenced by the clearest reasons and most cogent circumstances. But in this case, such circumstances and reasons are not to be found."¹

In a case, already cited, which was determined in the general court of Virginia, where a verdict of murder in the first degree had been rendered, the prisoner, to adopt the statement of the learned judge by whom the opinion of the court of appeals was delivered, "although excited by strong drink, and by an insult offered to a woman, which he thought himself bound to resent, and by a severe blow on himself, for which he had a right of redress, was not, by any of these causes or all combined, so deprived of his mental faculties, according to any evidence in the cause, that he could not distinctly understand what he willed and was about to do; or so that he could not reflect, and reason, and deliberate and determine, and choose what he would or would not do. According to the evidence, the first moving cause to commit the act, which constitutes his offence, was the injury done to a woman, for whom he felt an attachment; to her he promised redress for the insult and injury which she had received; and before he had himself received any personal injury, he avowed, that the measure of redress which she should receive, should be filled with the heart's blood of the deceased before sunset. And after he had shed the blood of the deceased, as he had threatened, he said 'he had killed the damn'd rascal, and was glad of it; that he would do the like to any

¹ Com. v. Murray, 2 Ashmead, 56.

man who should strike the woman he loved, and that any man of spirit would do the like.' It is true, he had received a severe blow in the mean time, which was calculated to increase, and no doubt did increase, his resentment against the deceased. But still he referred the revenge he had sought and taken, to the original cause of the offence—the blow given to the woman he loved. A considerable time elapsed between both causes of offence, and threats of daily revenge were made, before he executed his purpose; at least three quarters of an hour; in which time his resentment might have cooled. He employed this time not in hasty but in deliberate preparation to execute the purpose he had avowed of shedding the blood of the deceased. He dressed his wound, adjusted his clothes, and, being apparently composed, deliberately armed himself with a dirk, or being already thus armed, went abroad a considerable distance in quest of a gun; chose one with cautious circumspection and judgment; deliberately tried its fitness for the object he had in view, a sure fire; primed, snapped and flashed it; procured powder and lead, and loaded it; and thus armed with a drawn dirk, and a loaded gun, traversed the public streets, passed the market place, where, perchance, he might meet the deceased, and, finally, sought him at his boat where he found him; and then, with deliberate aim, shot him to death, while the deceased was unarmed, unresisting, and in actual flight from him." "This must certainly," said the learned judge, "be a wilful, deliberate, and premeditated killing," and the court of appeals, therefore, refused a new trial on the merits.¹

On a trial before Judge King, in Philadelphia, in 1826, it appeared that the defendant was a drummer in the marine corps, and attached to the navy yard in the district of Southwark, and that on the 19th of October, 1825, he had been out of the yard, but returned between the hours of two and four o'clock, and went to room No. 3. Soon after his return a noise was made by some one in the room, and the deceased, (who was drill sergeant of the station,) was at the time engaged in drilling some recruits in front of the room. The deceased ordered silence, and went into the room, where words were heard between the defendant and Clunet, the deceased. The order was not obeyed, and the noise continued. In a few minutes Clunet called upon Evan W. Gamester, who was sergeant of the guard, to arrest Green, the defendant. He went to the room where Green was, and ordered him to come with him immediately to the guard-house. He said he would go for Gamester, but not for Clunet. In a few minutes he called Clunet "a damned son of a bitch," or words to that effect. Clunet, who had left him and gone back to the troops, stepped into the room and said, "If you repeat them words again, you damned scoundrel, I'll knock you down with the musket." Clunet then held his musket at an advance, and came towards Green, and raised his musket with the butt towards Green, as if he meant to give him a shove back. Green then threatened that if he struck him with the musket, he would strike him back, or knock him down if he could. Gamester then caught Green by the left arm, and pulled him towards the door, to take him to the guard-house. Green then made use of

¹ Com. v. Jones, Opinion of Daniels, J., 1 Leigh, 612, 613, 614.

some aggravating expressions. Clunet came at him again with the musket: as he came within reach, Green jumped from Gamester and made some attempts to strike him. He caught Green and held him, and told him he should go to the guard-room. Clunet then came up with his musket and struck him an overhand blow upon the head. Green said, "it was a rascally or cowardly blow." Green was then taken to the guard-house. After he got there, he asked permission to go to the hospital to get his head, that was bleeding, dressed, which was given to him. He returned in about fifteen minutes with his head dressed. He was ordered up stairs, where he went. Ten or fifteen minutes before parade, Green was in the guard-room sitting by the stove quiet, and showed no passion or temper. Afterwards Green said, that "*Clunet never should strike another man; that he would shoot him the first opportunity he could get;*" he further said, that "*if he could get a loaded musket, he would shoot him as he passed the guard-room to the canteen.*" He then walked across the room once or twice; when he got to the desk near the door, he made a jump to the door, and seized a musket leaning against the pillar of the arcade, and fired. Clunet reeled and fell. When he fired, he bit his lips with great anger, and said, "he was damned glad he did not shoot Sergeant Duffy." The ball entered the back between the tenth and eleventh rib, about three inches to the right of the spine, passed through the diaphragm, penetrated the upper circumference of the liver, and came out of the front of the body on the right side, between the seventh and eighth rib. Immediately after discharging the musket, he brought it down to a charge, and let it drop and rushed into the guard-room, muttering something not understood. He was followed up into the second story of the guard-room, where he was commanded to surrender. He submitted, and was secured in irons, during which time he was asked how he came to commit the offence. Green said, "*I am not sorry for it, any man would have done the same,* and I demand that you deliver me over to the civil authority." He was then placed in a solitary cell, where he was visited frequently during the night. He several times asked if Sergeant Clunet was dead, and said, "O God, I must submit to my fate, and if he dies, I must be hung." On the second or third day, as the officer on guard opened the cell door, he heard Green exclaim, "I am damned glad I shot him. I hope I hit him in the right place, and I am not sorry for it." He told him he ought to take better care of what he said, and to think of something else; on which he observed, "O, Mr. Barton, I did not know you were here, and I did not know what I was saying." The day Sergeant Clunet died, which was the eighth day after receiving the wound, Green, who was informed of the fact, exclaimed, "O, my God, I am a murderer, and must be hung." It further appeared from the evidence produced, that the afternoon Clunet was shot, Green had been drinking, but was not intoxicated. In charging the jury, Judge King said, after directing attention to the question, first, whether there was deliberation, and secondly, whether there was a specific intention to take life, and assuming, from the evidence, that both were shown to exist, "Here I conceive a state of things arises, which as imperatively calls upon the court to pronounce their opinion upon what they believe to be the law of the case, as it is in-

cumbent on the jury to pronounce their opinion on the law and evidence. We will neither shrink from nor temporize with our duty in this respect, but by an unequivocal expression of our judgment, take that portion of the solemn responsibility of this cause which is attached to us, as the organs through which the justice of the commonwealth is to be vindicated. Upon the supposition assumed, we are of opinion that the prisoner at the bar is guilty of wilful, deliberate, and premeditated murder; of murder in the first degree, as it is understood by our act of assembly.”¹

The deceased, in a case occurring shortly afterwards, on the evening of the 9th of June, between 8 and 10 o'clock, while standing near the door of his dwelling with his brother and sister, received a stab in his belly by the hand of one who had approached and saluted him in a friendly manner; and it appeared that this man was recognised by both as the prisoner; and that the deceased himself, “a short time before he breathed his last, declared that black Williams stabbed him.” Besides which it also appeared in evidence, that the night previous to the murder, the prisoner and one York, who had been tried with Williams and acquitted, had been knocked down, without provocation, by some persons who fled into a house close by, and escaped through a back passage, and that the prisoner swore he would have satisfaction for it. It was also proved, that, on the day of the murder, the prisoner, with several blacks, had called at three different times at the house, inquiring in angry tones for the deceased; that after the murder, the prisoner was found concealed, with great care, under the stairway in a cellar, in the vicinity of the murder, and that when arrested, and while being conveyed to the prison, in reply to a remark made to him, had said, “Yes, but it is done, and I can't help it.” The jury, having convicted him of murder in the first degree, the court refused to disturb the verdict.² The opinion of the learned judge who presided, relates chiefly to the bearing of dying declarations and of new trials, though one passage in reference to the former subject is worthy of notice in this connexion.—“Tribunals,” he said, “whose function it is to decide disputed facts, either in criminal or civil investigations, are perpetually called on to infer the existence of one fact, not positively shown, from others, either admitted or proved, and with which the fact inferred has a necessary connexion. In trials for murder in Pennsylvania, for instance, the jury, before they can convict of murder in the first degree, must be satisfied, not only that the criminal has committed the felonious homicide of which he is charged, but that in its perpetration, he intended to take away the life of his victim. It is rare, indeed, that this last feature of this high crime can be shown by positive proof. Almost universally the jury are left to infer the existence of such a deadly intent, from the manner and circumstances of the homicide established. Felonious intention, guilty knowledge, malice and other vital elements of crime, are only ascertainable in the same way. If these are the ordinary functions of the jury, in what respect is it more difficult for a judge to decide from all the circumstances of a given case, as to the existence of a consciousness of impending dis-

solution in a declarant whose alleged death-bed declarations are offered in evidence? It is admitted that the judge should see his way clear, in coming to such a conclusion; but there is nothing incongruous, with local analogies, in his exercising such a function. The cases of this kind are numerous, in which a well regulated mind could act without hesitation. Suppose a victim of secret malice is found pierced through some vital part, with enough life left to tell by whom and how he has been so maltreated. Is it natural, nay, an irresistible influence, that such a sufferer is impressed with the conviction of impending dissolution, although he does not employ any of the brief moments left him between time and eternity in saying so?¹

In 1846, Chief Justice Hornblower, in a charge in a capital case, after quoting the New Jersey act, which, as has been observed, is the same as that of Pennsylvania, said, "This statute, in my opinion, does not alter *the law of murder* in the least respect. What was murder before its passage is murder now—what is murder now, was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases; or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and that in *all other kinds of murder* the convict shall be punished by imprisonment. But the law of murder is the same."² It becomes then the duty of the court, in the first place, to define and declare what constitutes, and what will amount to the crime of murder at the common law; and if the jury believe that the defendant has been guilty of murder, it will be the duty and the province of the jury to say whether the prisoner is guilty of the murder in the *first* or in the *second degree*. 'Murder is defined to be the killing of a person under the peace of the state, with malice aforethought, either express or implied in law.'³ Independent, however, of the common law presumption of malice, all will agree, that killing by poison, by lying in wait, or by wilful and deliberate and premeditated design, is proof of express malice, and so killing by the use of a deadly weapon shows a clear intent to take life. Again, if a man in the act of perpetrating, or attempting to perpetrate, arson, rape, sodomy, robbery, or burglary, kill another, this is evidence of express malice; because such conduct evinces a depraved mind, and shows malice against all mankind. In all these cases, therefore, the killing is murder in the first degree. Again, the premeditation or intent to kill, need not be for a day, or an hour, nor even for a minute. For if the jury believe there was a design and determination to kill, distinctly formed in the mind at any moment before, or at the time the pistol was fired, or the blow was struck, it was a wilful, deliberate, and premeditated killing, and therefore, murder in the first degree. Murder in the second degree under our statute, includes those cases of constructive murder which are not accompanied with an intent to take life, but are committed by gross carelessness, or in the commission or attempt to commit some less crime than those which I have above enumerated. Notwithstanding the difference is thus distinctly marked between murder in the first, and murder in the second degree, yet by

¹ *Com. v. Williams*, 2 Ashmead, 74.

² See *Commonwealth v. Dougherty*, in 1 Brown Append. page 18.

³ 1 Russell on Crimes, 421.

the terms of the statute, it is to be referred to the jury to say in which degree the defendant is guilty, if guilty at all."¹

A verdict of murder in the first degree was sustained in Tennessee, where it appeared that the deceased was killed on the night of the third of October, 1841; that the prisoner and he had had angry difficulties from a period long anterior, up to the time of the commission of the offence, which resulted from mutual wrongs done or charged; that the prisoner accused the deceased of having harboured his wife, to his great personal injury, and the deceased accused him of having fired his house; that on the 11th day of September, 1841, not many days before the murder, the prisoner left the country in a steamboat, with threats in his mouth of vengeance for his injuries, which he declared he would have before he left; that one week before the murder, he returned in the steamboat Pensacola, and kept himself so concealed that but one person saw him certainly, others saw what they took to be his tracks, and one, a person in disguise, whom he supposed might have been him; that on the night the deceased took possession of the building which had formed the subject of the controversy between them, he was killed, cowardly and treacherously; and that the prisoner immediately fled the country again, and being captured at Memphis, denied that he had been in the county of Obion since his first departure on the 11th of September, but admitted that he had returned up the river in the steamboat Pensacola to within fifty miles of the residence of the deceased.²

In another case it appeared from the bill of exceptions that it was proved at the trial by two witnesses on behalf of the prosecution, that in the month of March, 1842, the prisoner, Wade Swan, the deceased, T. G. Moore, and one Joel Blackwell, the last a penitentiary convict, were assisting the witness to roll logs. While engaged in this employment the prisoner and the deceased both became intoxicated; they were friendly during the whole day, so far as witnesses knew. The two witnesses at the close of the day went to the house, leaving the other three in the field. When supper was ready, they were called to come and partake of it, and came; both the prisoner and deceased being still intoxicated. After supper the deceased took a seat by the door, and owing to his chair-post slipping through a crack of the floor, he knocked his head against the door-cheek. One of the witnesses, William Dye, asked deceased if he was hurt, and he said "Not much." The prisoner then got a torch, and as he started out of the house tripped his feet and stumbled; the deceased said, "Take care and not fall." The prisoner replied, "Take care and not fall yourself," and left the house. The witness thought prisoner had gone home, but in about two minutes he returned and called to a little boy to take his torch; the witness told the boy to do so, and he took it. The prisoner was then seen having a handspike drawn in both hands, holding it to one side, and immediately stepping into the house he struck Moore, the deceased, two or three blows on the forehead, giving him a deep cut over the left eye, two or three inches long, and breaking the bone over the eye. Two or three red spots on the forehead of the deceased were also noticed. The deceased was sitting down, with

¹ State v. Spencer. 1 Zabriskie R. 196.

² Stone v. State, 4 Humphrey, 34.

his head leaning against the wall, and made no resistance to the assault. This took place about eight o'clock at night, and Moore died about nine o'clock on the morning of the next day. The handspike was of young gum, about four and a half or five feet long, and very large. The weapon was considered very dangerous, and it was clear that the deceased came to his death by the blow inflicted by the prisoner, as before stated. The deceased spoke a very few words only, after he was stricken by the prisoner. The deceased was an inoffensive man, and would not take his own part when imposed upon. The deceased and prisoner had always been friendly, and the prisoner had invited the deceased to help him roll logs on the next day. Another witness for the state testified that about ten or eleven o'clock the next day, he saw the prisoner passing by his field, six or seven miles from the place where the murder was committed, and saw him run into the woods. This witness was a constable, and called to two other persons to assist him in arresting the prisoner. They pursued and overtook him. When he had arrested him, witness told him that he had killed Moore; prisoner said he supposed he had "died damned suddenly," as he had given him "a few pretty good taps;" that the deceased deserved them, as he had treated him "damned badly" about a twenty dollar note that Joel Blackwell had at the log-rolling; the prisoner said that he pronounced the note to be a counterfeit, and that the deceased jerked or snatched the note out of his hands, saying he was "a damned fool and no judge of money." The prisoner also, when arrested, stated that he was hunting his cow. "The question," said the learned judge who gave the opinion of the court, "which first presents itself upon the record is, whether the facts sufficiently establish that the homicide is of that kind of wilful, deliberate, malicious and premeditated killing, which, by the provisions of the 2d section of the act of 1829, c. 23, will constitute the crime committed to be murder in the first degree? The characteristic quality of this offence, and that which distinguishes it from murder in the second degree, or any other homicide, is the existence of a settled purpose and fixed design, on the part of the assailant, that the act of the assault should result in the death of the party assailed;" and it appearing that death was the object sought for and wished, the judgment was affirmed, the case according to the evidence coming within the definition of murder in the first degree as given in the statute.¹

As was observed on another occasion, there are certain features, which, in cases of deliberate homicide, draw forth, generally from the court's instructions to the jury that by them a deliberate intent to take life is shown. Where a man makes use of a weapon likely to take life; where he declares his intentions to be deadly; where he makes preparations for the concealing of the body; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it; where, in any way, evidence arises which shows a harboured design against the life of another;—such evidence goes a great way to fix the grade of homicide at murder in the first degree. Thus, where the defendant struck the deceased violently on the head

¹ Swan v. State, 3 Hump. 137.

with a sharp and heavy axe, it was held murder in the first degree, deliberation being shown; and it was said by M'Kean, C. J., "Let it be supposed that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge human actions, be deemed a premeditated violence."¹ Where a man loaded a pistol, took aim at, and shot another, it was held murder in the first degree.² If one man shoot another through the head with a musket or pistol ball,—if he stab him in a vital part with a sword or dagger,—if he cleave his skull with an axe, or the like,—it is almost impossible for a reflecting and intelligent mind to come to any other conclusion than that the perpetrators of such acts of deadly violence intended to kill.³ Where the defendant deliberately procured a butcher's knife, and sharpened it for the avowed purpose of killing the deceased;⁴ where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was;⁵ where he thrust a handspike deeply into the forehead of the deceased;⁶ the presumption was held to exist, that the killing was wilful.⁷ But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death. Thus, where the weapon of death was a club not so thick as an axe handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to take life.⁸ The same presumption of intention is drawn with still greater strength from the declared purpose of the defendant, which is always admissible in evidence for such a purpose.⁹ Thus, where the prisoner, a negro, said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;¹⁰ where it was said, "I am determined to kill the man who injured me;"¹¹ where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased;¹² where, in another case, the language was, "I will split down any fellow that is saucy;"¹³ where the prisoner rushed rapidly to the deceased, and aimed at a vital part;¹⁴ where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed;¹⁵ in each of these cases it was held murder in the first degree.

Murder in the second degree, strictly speaking, may be illustrated by that class of homicides where the intention is not to take life, of which, death ensuing unexpectedly from bruises inflicted with the intent merely to do bodily harm, death caused by a workman throwing timber from a house into the street of a populous city, without warning, or by a person shooting at a fowl, *animo furandi*, and killing a man,

¹ Resp. v. Mulatto Bob, 4 Dallas, 145.

² 4 Penn. Law Journal, 157.

³ Bennet's case, 11 Leigh, 749.

⁴ See U. S. v. Cornell, 2 Mason, 94; Woodside v. State, 2 Howard, 656; State v. Toohy, 3 Rice's Digest, 104; Com. v. Webb, 6 Randolph, 721.

⁵ Com. v. Murray, 2 Ashmead, 57.

⁶ Jim v. State, 5 Humph. 174.

⁷ Com. v. Burgess, 2 Va. Cases, 484.

⁸ Com. v. Mulatto Bob, 4 Dallas, 146.

⁹ Com. v. Zephon, Oyer and Term. Phila. July, 1844, MSS.

² Com. v. Smith, Appendix, 389.

⁴ Com. v. Burgess, 2 Va. Cases, 484.

⁶ Swan v. State, 4 Humphrey, 139.

¹⁰ Stewart v. State, 1 M'Cook, 66.

¹² Com. v. Smith, Appendix, 389.

¹⁴ Com. v. O'Hara, 7 Smith's Laws, 694.

are instances frequently given.¹ There may, also, as is shown more largely in the chapter on riotous homicide, be cases where death ensues during a riotous affray, under circumstances which would constitute murder at common law, but which, in consequence of the want of a specific intent to take life being shown, amount but to murder in the second degree. Thus, where it appeared that the deceased, during the Kensington riots,² was killed while a desultory fire was going on, the object of which was to prevent either of two contending parties from taking possession of a position which both of them were desirous of obtaining, it was said that a homicide, committed under such circumstances, though murder at common law, deliberation being shown, might not be murder in the first degree, and a verdict of murder in the second degree was consequently rendered. The learned judge who tried the case, however, charged the jury, "that if one or more of the parties so engaged in an unlawful combat, deliberately fire at and kill an innocent third person, taking no part in the conflict, having no just reason to regard him as one of the belligerents, such killing would be murder in the first degree. It would present the case of a wilful, deliberate, and premeditated killing, perpetrated with an instrument likely to take life, rendering the actual perpetrators guilty of the highest grade of crime known to our criminal code. If the testimony, in your judgment," he said, "brings clearly home to the defendant such a charge, he should be convicted. If, however, the commonwealth has not fully satisfied your minds in the affirmative of this position, or if the proofs adduced by the defendant have rebutted this allegation, or thrown a fair doubt upon its certainty, then you ought not, and cannot justly convict him of that part of the charge involving capital punishment."³

As has already been observed, where the defendant was in such a state of drunkenness, as to be incapable of forming a design, the verdict should be for the second degree.⁴

And so if a pregnant woman be killed in an attempt to produce abortion in her, and it appears that the design of the operator was not to take the life of the mother, it is murder in the second degree;⁵ and so also, as has already been noticed, homicide by poison and lying in wait may sometimes fall within the second degree, where there was no specific intent to take life.

In Virginia and Ohio, it is said that where a homicide is proved, the presumption is that it is murder in the second degree. If the prosecutor would make it murder in the first degree, he must establish the characteristic of that crime, and if the prisoner would reduce it to manslaughter, the burden of proof is on him.⁶

The general result of the authorities is that wherever the deliberate intention is to take life, and death ensues, it is murder in the first degree; wherever it is to do bodily harm or other mischief, and death ensues, it is murder in the second degree; while the common law de-

¹ *Whitford v. Com.*, 6 Randolph, 721; *Com. v. Dougherty*, 7 Smith's Laws, 696.

² Reported in the appendix.

³ *Com. v. Hare*, 4 Penns. Law Jour. 401.

⁴ *Com. v. Hagarty*, cited Lewis, C. L. 403; *Pirtle v. State*, 9 Humph. 664. See ante, 369.

⁵ *Ex parte Chauncey*, 2 Ashmead, 227. See ante, 359.

⁶ *Hill's Case*, 2 Gratt. 594; *State v. Turner*, Wright, 20.

inition of manslaughter remains unaltered. This distinction, however, it is difficult practically to preserve. In those jurisdictions where the juries are entitled to take control of the law, it of course gives way to other tests more agreeable to the prejudices of the particular case. And even where the court is at liberty to assume its proper province, and where it lays down the law with precision and fulness, a jury is very apt to seize upon murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect. Thus, where S. having conceived and declared a design to kill P., the parties met afterwards in front of S.'s own house, and a quarrel ensued, in which S. gave the first offence; P. proposed a fight; upon which S. retired for a very brief time into his house, armed himself with a loaded pistol, which he concealed in his pocket, and instantly returned so armed to the scene of quarrel; then P. threw a brickbat at S., which did not hit him, but falling short of him, broke, and a small fragment struck S.'s child, standing within his own door, who cried out, and S. hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, "He has killed my child and I will kill him," advanced toward P., deliberately aimed and fired the pistol at him, then retreating with his face towards S., and the shot took effect and killed P. A verdict of murder in the second degree being rendered, the court refused to set it aside.¹

Indictment and verdict.—Since, under an indictment for murder at common law, a verdict will be sustained for murder in the first or second degree at the discretion of the jury, it is neither usual nor safe to specify or discriminate the degrees in the indictment.² Even when the homicide was committed in the perpetration of arson, rape, robbery, &c., it is not necessary to set such collateral purpose out.³

As has already been seen, the weight of authority now is, that under an indictment for murder, it is necessary for the jury in their verdict to specify the degree. If they find a mere verdict of "guilty," it seems that no sentence can be passed on it.⁴

¹ *Slaughters v. Com.*, 11 Leigh, 682.

² *Com. v. Wicks*, 2 Va. Cases, 387; *Mitchell v. State*, 5 Yerger, 340; *Com. v. Flannagan*, 8 Watts & Serg. 415; *Com. v. White*, 6 Binney, 183; *Com. v. Miller*, 1 Va. Cases, 310; *Com. v. Gilbert*, 2 Va. Cases, 70; *Hines v. State*, 8 Humph. 597; *McGee v. State*, 8 Mis. 495.

³ *Com. v. Flannagan*, 8 Watts & Serg. 415.

⁴ See ante, 284.

APPENDIX.

*Searg. & Hunt
2 ~~Walt~~ Rep 300*

THE TRIALS OF RICHARD SMITH, AND ANN CARSON, ALIAS ANN SMITH, FOR THE MURDER OF CAPTAIN JOHN CARSON.

CONDENSED FROM THE PAMPHLET REPORT.

Commonwealth v. Richard Smith and Ann Carson, alias Ann Smith.

At a Court of Oyer and Terminer and general jail delivery, held at Philadelphia, May 1816, before the Judges of the Court of Common Pleas.—The prisoners were indicted for the murder of John Carson, on the 20th January, 1816—Richard Smith as principal, in the first degree, and Ann Carson in the second degree.—The following gentlemen were engaged in the cause.

On the part of the prosecution—The Attorney General, Jared Ingersoll, Esq., and Edward Ingersoll, Esq., Deputy Attorney General.

On the part of the prisoners—For Richard Smith—William Rawle, Peter A. Browne, and Jonathan B. Smith, Esqs.—For Mrs. Carson—Samson Levy, and Joseph Ingersoll, Esqrs.

THURSDAY, 23d MAY, 10 O'CLOCK, A. M.—The Court opened. The Hon. Jacob Rush, President; William Moulder and Samuel Badger, Esqrs., Justices, present.—The Attorney General, intending to try the prisoners separately, upon the distinct charges, Richard Smith only was placed in the bar.—The prisoner's counsel proceeded to call the names of his witnesses, when the following persons were absent:—Charles Jones, Samuel Ewing, Esq., Ann Kidwell, Mrs. Yorke, Dr. Gallagher, Jacob Baker, Esq., John Tittermary, Dr. James Rush, Thomas Goodwin and Miss Wright.

Peter Cummins, black man, called and sworn.

Question. Did you serve this subpoena upon Samuel Ewing, Esq., personally? Answer, Yes. Q. On Ann Kidwell? A. Yes. Q. Did you serve it on Mrs. Yorke? A. Yes. Q. On Jacob Baker, Esq.? A. Yes. Q. On John Tittermary? A. Yes. Q. On Dr. James Rush? A. Yes. Q. Did you make diligent search for Charles Jones? A. Yes, sir; he was gone to New Castle or Wilmington, and will not be back until Friday; he lives or keeps store at the corner of Chestnut and Second streets.

P. A. Browne, Esq. Having now proved, your honours, service on these witnesses, I pray attachments may issue against them.

Judge Rush. Perhaps you had better wait a little while—no doubt Dr. Rush and Dr. Gallagher will come about eleven o'clock.

Browne. Does your honour think the counsel ought to take any responsibility upon them in this case?

Judge Rush. Let the attachments go then.

Attorney General. Peter Cummins, when were these subpoenas delivered to you? A. On the 21st.

An affidavit was then drawn by Mr. Browne, and sworn to by Peter Cummins, to the same effect as the foregoing testimony, and the attachments made out by the prothonotary.

P. A. Browne. If your honours please, make the attachments returnable to-morrow morning—Charles Jones is now out of town, but will be back then. I have examined him; he is a material witness.

Att. Gen. I wish the court to understand that I not only do not consent, but object to this proceeding. This case was postponed with the concurrence of the Commonwealth and the prisoner, until Tuesday, and then at the request of the prisoner's counsel, postponed to this day. I observed that during an interval of four days, Wednesday, Thursday, Friday, Saturday, passed, and until Monday, without a subpoena being taken out. The witness says he received them the 21st; we have therefore Wednesday, Thursday,

Friday and Saturday, and until Monday, four days; not a single step taken to secure the attendance of witnesses. I conceive, therefore, it is of as much importance to the prisoner as to the Commonwealth, that the cause should not be postponed.

Browne. The cause was postponed before, to get a material witness from New York; everything proper has been done to procure his attendance. As to the witnesses who reside in Philadelphia, it was known they lived near the court house, and it was not thought necessary to take measures to compel their appearance so long before the cause was to come on. I have seen Mr. Jones, and he promised he would attend. I did not know of his intention to leave town. Would it have been supposed it were necessary to serve subpoenas to ensure attendance, it would have been done. It is well known to be the practice to take out subpoenas the day before the trial comes on. It is then fresh in the memories of those upon whom they are served, and they are more apt to attend than otherwise. This course was thought best to be pursued in the present case, not at the instance of the prisoner; he knew nothing concerning it, but by his counsel. They had no communication with him upon the subject, for they could not attend him at the prison even, without being spied. I therefore do not conceive how there can be any objection to postpone the cause until to-morrow. In a case of this kind, your honours would not ask the counsel to take any risk upon us; we have taken the subpoenas out in the usual manner, and I have a letter in my hand from the witness in New York, in which he tells me he is about starting in the steamboat, and will be here in a day or two.

Judge Rush. The court are of opinion, that in order to put off the cause, it must be known what the witness is to prove, and an affidavit must be made to that effect.

W. Rawle, Esq. We hope, your honours, the cause will be postponed upon the common affidavit that the witness is material. I do not consider it proper that the prisoner in a capital case must intimate to the court, and give to the prosecuting attorney an opportunity of knowing what his witnesses are to prove. I refer your honour to Lord Baltimore's case, in which Lord Mansfield adverted to the imprudence of making such a disclosure, thereby putting it in the power of the prosecution to meet what would be disclosed; and why should we practise under more rigid rules than in another country, where the laws are so much more severe? It is sufficient in all cases to declare upon oath that the evidence is material. I trust the court will not impose upon the prisoner, rules, which to the best of my recollection, have never been the practice in this country; we will make the general affidavit, and hope it will be sufficient. As to the time of putting off, I believe the attorney general first proposed it. We do not think we are called upon to state what the witness is to prove; we are willing to present the affidavit in the manner I mentioned.

Judge Rush. There is a difference of opinion, Mr. Rawle; we find that in the case of *Ogden* in New York, in the case of *Callender*, in the case of *Cooper*, where you prosecuted, and therefore you have a right to know, special affidavits were required. In England they always do it. Upon general principles it is very preposterous, putting off a cause because of the absence of a witness, and concealing from the view of the court what that witness is intended to prove. If a cause can be put off in this manner, I ask where is the end of delay? From the observation of Lord Mansfield, a case could not be tried because of the neglect of the defendant. Why this should be, we cannot know, unless reasons are shown to the court. I have never been satisfied with the reasons given in the books, that the prisoner's defence is taken away; we are clearly of opinion that a special affidavit must be made, showing in what respect the witness is material.

Mr. Rawle. I beg leave to state to your honour, that in Judge Cooper's case it was not at my instance that the special affidavit was required, but it came only from the court; and I beg leave to remind your honour that Judge Mansfield tells you, "I have known it repeatedly done."

Mr. Browne drew up a general affidavit, to which the prisoner was sworn.

Mr. Browne. The affidavit being now made, I desire that it be filed with my reasons, and afterwards I will renew my motion; but first I will read it. (Mr. Browne here read the affidavit, the purport of which was, that the prisoner considered the evidence of the absent witness material to his defence.) Upon this affidavit I renew my motion to postpone the cause until to-morrow morning.

Judge Rush. Let the cause go on—we have decided the point.

The names of the absent witnesses were again called before the attachments should issue. Dr. Gallagher and Samuel Ewing, Esq., had intimated that they were ready to attend at any moment—no attachments were therefore issued against them. Mr. Ewing was engaged in a cause at another court.—At the wish of the prisoner's counsel, the cause was delayed until the return of the attachments.—The court, after sitting about half an hour for the return of the attachments, came to a resolution to adjourn until half-past two o'clock in the afternoon, thinking it would take two hours, at least, to procure the attendance of the witnesses.

THURSDAY, P. M., HALF-PAST TWO O'CLOCK.—The prisoner was addressed by Tench Coxe, Esq., Prothonotary of the court, in the following manner:

Richard Smith, you are now about to be tried by a jury of your country. You are allowed by law to challenge twenty jurors peremptorily, or without showing cause, and as many afterwards as you can show cause for.

The names of the whole panel were then put in a box, and Randall Hutchinson, Esq. directed by the court to draw them out. After twenty peremptory challenges, the following persons were either sworn or affirmed, as jurymen to try the cause:—1. Jacob Shoch, sworn; 2. Jacob Lancaster, sworn; 3. Francis Douglass, sworn; 4. John Wilkins, affirmed; 5. William Bruner, affirmed; 6. Stephen Witmer, affirmed; 7. David Seegar, sworn; 8. George Thompson, affirmed; 9. William Pritchard, affirmed; 10. George Getz, sworn; 11. John Rees, sworn; 12. Samuel Holgate, affirmed.—The prisoner then standing up, the prothonotary addressed the jury.

Gentlemen of the jury—The prisoner at the bar, Richard Smith, is now delivered over to you upon a charge of murder; the bill presented by the grand inquest inquiring for the body of the county of Philadelphia, is as follows:—If you find the prisoner guilty, you will also find what goods and chattels he was possessed of at the time he committed the fatal act; if you find him not guilty, you will say so and no more. It will also be proper for you to inquire and find, whether Richard Smith fled, as is specified in each count.

Edward Ingersoll, the deputy attorney general, then addressed the jury as follows:—May it please the court—Gentlemen of the jury. The prisoner whom you have been charged to try, and upon whose guilt or innocence you are now to decide, is brought before this court, in consequence of an act which has occupied, to a very great degree, the public attention. The rumour has spread upon all sides; the tale is told with a variety of colouring and with many additions; for, gentlemen, seldom has our attention been excited by similar occurrences.—It is now my duty to give you a particular recital of the events as they occurred; that you may give attention to the evidence, as it is brought forward, and that if any prejudices have been formed they may be removed. Captain John Carson, for whose death this man is now to be tried, about fifteen years ago married the daughter of Captain Baker, then an officer in the navy, and lived with her until about four years since, when he sought employment abroad, where he remained until January, 1816. His wife, in the meantime, had converted his property into a china store, which was kept until the time of the accident. She had lived with the prisoner, Richard Smith, from some time in October, 1815, until January, 1816; whether married or not, gentlemen, I cannot say. After Captain Carson returned, he went to demand his property and his house. He there found the stranger, Richard Smith; an adjustment was made—all offences were to be forgiven; they (Captain Carson and his wife) were to live together in harmony, and Richard Smith, the prisoner, declared his intention to leave the city. About this time the prisoner was seen examining a pistol, heavily loaded, and declared that if Captain Carson set his foot in the door he would shoot him. On the evening of the 20th January, in this present year, Captain Carson went to the house to take peaceable possession. The prisoner and Mrs. Carson left the house, separately, and met at the office of a gentleman, a member of the bar; there, Mr. Richard Smith asked that gentleman for a pistol in such a way as to show he had asked for it before; it was properly refused, and he left the office without it. The prisoner again approached the fatal spot; Captain Carson was sitting in the parlour, at the fire, with his youngest child on his knee; Captain Baker, and Mrs. Baker, his wife, sitting near, forming the family circle. The prisoner entered the room with such an appearance, as terrified the maid servant, who ran for assistance. With his right hand under his coat, his left over it, he calmly walked to the middle of the room and took off his hat. Captain Carson arose and told him he must leave the room—at the same time intimating that no violence from him was to be expected. Mr. Smith turned round and asked Mrs. Carson if he should leave the room; at a word of encouragement from her, he remained; the prisoner was perfectly silent, not a blow nor an angry word proceeded from either side, until the prisoner drew his pistol, presented it to the mouth of Captain Carson, and fired. The prisoner threw the pistol aside, and made an attempt to escape. Captain Carson on his death-bed declared he had received the fatal wound from the prisoner, who had acted as a midnight assassin. During his illness he had the best medical attendance, and in February he died. During his illness he had repeatedly declared he had received the wound from Richard Smith, who was not offended. If these circumstances, gentlemen, are satisfactorily made out from the evidence which will be adduced, we confidently ask you, in the course of public justice, for a conviction.

Thomas Abbott called and sworn.

Judge Rush. Did they live at your house?

Answer. Yes, sir, at that time. I left my house, and just as I got to the corner I saw Mrs. Carson come out of the house with the bar of the door in her hand; I called

to her and asked her where she was going; she observed, "Come along." I immediately followed her to Jonathan B. Smith's office; she asked me to come in; I asked her what was the matter. Mr. Jonathan B. Smith came to the door and asked me to walk in; I went in—I asked her what all this meant; she observed that Captain Carson had come to the house and turned her and Richard Smith out of it. Mrs. Carson asked Jonathan B. Smith if he had seen Richard Smith; he said he had been there about twenty minutes before; invited her to sit down—he would be there again in a few minutes. We had not been in more than five minutes when Richard Smith came in. Mr. Smith observed when he came in, that he had been to four or five 'squires, that they were either out or in bed; after that Mrs. Carson asked Mr. Smith if he would go home; she observed, we can have a fire made in the chimney-place, in the chamber above; they may keep possession below, and we will keep possession above. Richard Smith then asked Mr. Jonathan B. Smith to give him the pistol. Mr. Jonathan B. Smith observed he could not give it to him, he was afraid he would do harm with it. Richard Smith observed to Jonathan B. Smith, he was not his friend, if he would not give it to him. Mr. J. B. Smith observed, if he would give it to him, he would not be his friend; he could not persuade Mr. Smith to give him the pistol. I observed to Richard Smith that Captain Carson had no weapon of any kind, I would give him my word and honour; and that there was not the least intention to do him harm in any way whatever. Richard Smith swore he did not care for that, he would not trust him; and that if Carson attempted to touch him he would shoot him. From Mr. Smith's, Richard Smith, Mrs. Carson and myself—

The Deputy Attorney General stopped the witness and asked him, how did he ask for the pistol? Did he ask for the pistol?

Ans. He asked him to give him *the* pistol.

Dep. Att. Gen. You are sure he said *the*?

Ans. Yes.—Mrs. Carson observed, "Come, let us go; you know where there is a pistol." From there I went with Mr. Richard Smith and Mrs. Carson over to the door; they asked me to walk in.—They asked me if I would walk up to the parlour. The parlour is up stairs. I told them no, I believed I would go home. By some persuasion I agreed I would go up.—I told them they might go in, I would stay at the front door. I staid at the front door about one minute. Mrs. Carson and Richard Smith immediately went up stairs. I went up to the parlour door; Mr. Smith was standing at the parlour door in this position (*showing it*) with his right arm in his surtout, under it, and his left hand over it. I immediately passed by and went into the parlour; when I got into the parlour, Captain Carson was sitting by the fire, with his youngest child on his lap. Mr. Baker was sitting near to Captain Carson, Mrs. Carson also was sitting near. I am not positive as to Captain Baker, whether he was sitting or standing; as soon as I entered the room, Mrs. Baker began to talk to Mrs. Carson respecting her living with the prisoner, and wishing her to leave him, and so on. The black girl came in to take the child from Captain Carson, as I supposed, to put it to bed. I do not think it was more than half a minute when Richard Smith came in; and he staid a little back from the parlour door, in this position (*again showing it*), his surtout buttoned at the top and bottom; when he came in, Captain Carson arose from his chair and observed to him, "I have come here to take peaceable possession of my house; out of my house you must go." Richard Smith observed, "Very well, sir;" and turned round to Mrs. Carson and said, "Ann, shall I go?" She replied, "No, stay." Richard Smith then moved up to the furthest corner of the room, at least in that direction; Captain Carson went up and told him again, says he, "Mr. Smith, you must leave my house, for in my house you cannot stay; I have no weapon of any kind." He repeated it two or three times in that way. Richard Smith was standing up pretty much towards the corner by the card table, and Captain Carson was near him. Captain Carson had his hands down by his sides, open; says he to Richard Smith, "You cannot stay in my house, my hands are tied." In an instant, as it were, Richard Smith drew the pistol. Mrs. Baker immediately cries out, "My God! he has a pistol;" and immediately, before hardly the words were out of her mouth, the pistol was off, and he shot Captain Carson in the mouth.

Quest. Did you see the pistol?

Ans. Yes, sir. It was done in a moment—when Mrs. Baker cried out, "My God! he has a pistol," I saw the pistol, and in an instant the pistol was off.

Quest. Did you see it drawn out?

Ans. No, sir, I cannot say I did. It was done in an instant.

Quest. How near was it to Captain Carson when it was fired?

Ans. It was about two inches from his mouth.

Quest. What part of the pistol was it? Ans. The muzzle.

Quest. How near were they standing to each other?

Ans. About as far as from me to Mr. Rawle, (*the table was between the witness and Mr. Rawle, the breadth of which was about three feet.*) Captain Carson immediately exclaimed,

I am a dead man; he put his hand to his mouth in this way, (*showing the manner*) and immediately made a catch at the window as he fell.

Judge Rush. Which was the window he caught at?

Ans. The window in Second street, near Dock street. Richard Smith immediately threw down the pistol to make his escape. Mrs. Baker immediately cried out to Captain Baker to catch him. Mrs. Baker made a grab at him first, and immediately cried out.

Quest. Did she catch him?

Ans. She just got a hold of his surtout, but could not hold him. From there I went down stairs, and Captain Baker, and Mr. Jonathan B. Smith, his black boy, and I believe two watchmen had him in possession. From there I went up to the court house, and from the court house I went to the jail.

Question from Judge Rush. What court house?

Ans. The watch house. I then went back to the house.

Quest. When Richard Smith came in had he his hat on or off?

Ans. I believe he had it on.—I saw Captain Carson very often during his illness, and sat up with him; I was with him the night he died, which was on the fourth day of February, he died.—At times he was delirious, he was raving; part of his time he took a number to hold him to keep him down; a few moments before he died he took five or six of us to hold him.—I believe Captain Carson, nearly all the time of his illness, thought he would not recover.

Judge Rush. Did you hear him declare himself, that he would not recover?

Ans. Yes, sir.

Cross-Examined.—Browne. You have said, Mr. Abbott, that when at Jonathan B. Smith's office, Richard Smith said he had been to several justices. Did he state what was his business with them? Ans. He said, it was to turn Captain Carson out of the house.

Quest. You have stated that Captain Carson ordered Richard Smith out of the house, and said that he intended to take peaceable possession. Did he say he had been advised to take peaceable possession? Ans. Yes, sir, he said he had been advised.

Quest. Did he say by whom? Ans. He said by his attorney.

Quest. Be so good as to tell us what was the size of Captain Carson? Was he small or large, strong or —? Ans. Strong, very strong.

Quest. Was there any comparison as to the strength of Smith and Carson?

Ans. I believe Captain Carson was the strongest.

Quest. Was he not to appearance *very much* stronger than Richard Smith?

Ans. To appearance he was; he was a larger man.

Quest. Be so good as to describe the size of Captain Baker. Is he a small or large man? Ans. He is a large man.

Quest. Larger than Smith? Ans. Considerably larger.

Mrs. Jane Baker Sworn.—On the 20th January I went up to the corner of Dock and Second streets; it was then about ten o'clock, the watchman was crying the hour of ten; I found Captain Carson walking up and down the shop; I said to him, John, my dear, come home with me; I repeated it two or three times; he said, I will not; this is my right, and here I will remain; if you will not go, we will go up stairs, I said to him; we went up stairs. Quest. Who went up?

Ans. Captain Baker, Captain Carson, and myself, went up into the parlour; we sat down by the fire; we had sat some time there, when Mrs. Carson came into the room; a little while after her Mr. Abbott came in, and after Mr. Abbott Mr. Richard Smith came in; I observed when he came in he had his right hand on his left breast, under his surtout; he advanced, passed to the sofa—with his left hand he took off his hat and laid it on the sofa, nearly about the middle of the sofa; Captain Carson then rose up and advanced towards Mr. Smith, and said, "Mr. Smith, you must leave this house, for you cannot remain here any longer; I have come here to take peaceable possession, you cannot remain here any longer;" Mr. Smith staid a little bit, then advanced towards the corner towards the front window—the Second street window—there were three windows in the room, two in Second street, and one in Dock street. Captain Carson advanced, repeated what he had said, and said, "My hands are tied, I will not raise the weight of my little finger against you." When Captain Carson advanced, I got up and went towards him; I was fearful that they would fight, and I got up with an intention to throw myself in between them, and that as Captain Carson was bound over, I was fearful Mr. Smith would irritate him, and make him strike him.

Quest. Where, Madam, were Captain Carson's hands? Ans. At his sides, sir.

Quest. Were they open or shut?

Ans. I believe they were open. Mr. Smith then drew something from under his surtout, which at first I supposed to be his pocket-handkerchief; Mr. Carson being so

much more portly than Mr. Smith, I did not discover the pistol until it was presented; I exclaimed, "Gracious God! he has got a pistol!" it was off—it was gone. Captain Carson then put his hand to his mouth in this manner (*showing it*), he then tried to support himself, he put it to the window casing; he told me his head got giddy—he fell, and exclaimed, "I am a dead man." But I observed when Mr. Smith drew the pistol and presented it, he had to lean considerably back over the card table.—Mr. Smith threw the pistol from him and fled; I immediately hallooed "Murder, murder, seize the villain!" I seized him myself, but could not hold him. I then called to Captain Baker to catch him; I then returned to Captain Carson and tried to raise him, but I could not do it; there were several gentlemen came into the room, and some of them came to my assistance. We raised Captain Carson up and took off his coat and waistcoat, and neck-cloth; I then went and got some pillows to lay Captain Carson's head on. Dr. Niel was called immediately, and wished to sew up Captain Carson's tongue; his tongue was very much cut, and he wished to sew it up; Captain Carson would not agree to it; we then got a bed and laid him on it, and then sent for Dr. Rush. I pulled off the remainder of his clothes myself, and examined all his pockets, he had no weapon whatever; he had a lead pencil, a slate pencil, thirty cents, and some papers.

Quest. How did his wound look?

Ans. A great deal of blood was about it—it bled profusely; I washed up the blood myself. Quest. But how did it look? What harm was done?

Ans. His tongue was much lacerated, his lips were burnt.

Quest. Did you see the pistol the moment it was presented?

Ans. Yes, sir, it was about two inches from his mouth. Quest. What size was it?

Ans. I believe it was a horse-pistol. Quest. A large one?

Ans. I can't say exactly; I do not know the common size; Mr. Charles Ross was in the room, he said it was a horse-pistol.

Quest. Had you any conversation with the prisoner before that?

Ans. The Tuesday before it, I had a conversation with him. On Tuesday evening, I went up to Mrs. Carson to have some conversation with her about the children. When I went in, they were sitting in the room appropriated for the kitchen. I asked her how they were—she told me. Quest. Who did you find in the kitchen?

Ans. I found Captain Smith and Mrs. Carson. After I had sat down a few minutes, Mrs. Carson said to me, "Captain Carson has applied for a divorce; and the notice or certificate, I do not know the name of it exactly, has been served upon me." Mr. Smith made answer and said, it was a pity it had not been done before. "I dare to say, you think so, sir," says I; "so you live here now; you have got yourself into a good living, and taking everything from the children." "Not so much as you have done, madam," said he. "As I have done; I have helped to earn every dollar that is in that shop; but if I was a man you would not sit there and tell me so; but I understand, sir, you are armed;" "I am," says he; with that, Captain Carson's eldest son came up stairs, and told me Captain Carson was waiting for me; I went down and went away with Captain Carson.

Quest. Mrs. Baker, at the time Mr. Carson advanced to Smith, was there room for Mr. Smith to pass? Ans. I think so, sir. Quest. Were you near him? Ans. I was close to his side. Quest. How far off was Captain Baker? Ans. Captain Baker stood nigher the door, at the furthestmost side of the sofa. Quest. Did you see any blow given to Smith? Ans. No, sir; there was none that I saw. Quest. Could you have seen one had it been given? Ans. I think I could, sir. Quest. Was your daughter married to Captain Carson? Ans. Yes, sir. Quest. How long ago? Ans. I cannot exactly tell; I think it will be sixteen years next June. Quest. Were you present at their marriage? Ans. Yes, sir. Quest. How long did they live together? Ans. I can't exactly tell; Captain Carson went to the East Indies after their marriage, and returned; he was at Charlestown two years and upwards, before he came back. Quest. How long was he absent this time? Ans. He went away in February, 1812, and would have been absent four years last February. Quest. When did he come back the last time? Ans. In January, the fourth or fifth. Quest. Why did he go abroad, madam? Ans. His conduct here in Philadelphia was not what it should have been. A dispute arose about the vessel in which he sailed, and the vessel was taken from him. He commanded the Pennsylvania packet. He then found he could not get a vessel out of this port, and he went away.

Cross-Examined.—

Mr. Browne. When he returned from that voyage in the Pennsylvania packet, did he come to his own house? A. Yes, sir; they boarded with me; but not when he went out with Captain McKibbin. Q. Where did he go then, when he returned? A. I did not see him, but I was informed he went to a sailor boarding-house. Q. How long did he stay there before he went to his family? A. I can't exactly tell; but I believe about

a day and a-half. We looked for him anxiously, and expected him every minute. Q. Did he after that time come home voluntarily? A. No, sir; Mrs. Carson went for, and brought him out of the sailor boarding-house. Q. In what situation did she find him? A. She found him very much intoxicated—in liquor. Q. After this did he go to New York? A. He staid at home about two weeks, then he said he never would sail again out of Philadelphia, and he said to her, if you will go with me to New York, I will go there. Q. Did she go to New York with him? A. Yes, sir; she did. Q. Did she return or stay there? A. Yes, sir; she returned. He did not conduct himself as he ought to have done, and she left him. Q. Where did he go next, madam? A. He went out from New York in some vessel, before the mast, and she never heard of him, nor received a scrape of a pen from him. Q. You say he went out before the mast, and did not return until January, 1816; how was she supported during that time? A. By her own industry—her persevering industry. Q. He left nothing, then, to maintain the children or her? A. No, sir, nothing; she has four children she clothed, educated and supported. Q. Be so good as to state who rented the house at the corner of Dock and Second streets? A. My husband and me took a lease of it for two years and three or four months. Q. Was it during Captain Carson's absence? A. Yes, sir; it was the January before he came home with Captain M'Kibbin, my husband and me took that house. Q. Did Carson pay the rent? A. No, not one cent of it. Q. Who took the lease of it after yours expired? A. Mrs. Carson, in her own name; she paid the rent and received receipts in her own name. Q. Had she not to pay some debts of his after he went away? A. Yes—she paid to Mr. Connelly, the joiner, forty-five dollars. Q. Did she not carry on business in her own name? A. Yes, sir, as a feme-sole trader. Q. Did she not contract and pay debts in that capacity? A. She did, sir. Q. Was she sued as such? A. She was, sir. Q. Was she imprisoned as such? A. She was, sir, imprisoned in the Debtors' Apartment. I believe on that very occasion she took advice from Judge Rush, and Judge Tilghman also, to know whether she could be sued alone, while she had a husband; but they recovered, and she suffered herself to go into the Debtors' Apartment. Q. Was there not a rumour of his death? A. Yes, sir; a sailor said he was dead, who came from the place. Attorney General. Mrs. Baker, did not Captain Carson leave personal property when he went away? A. He left property, but she never got anything from it. She paid debts, and paid up his arrears to the Captains' Society; but never received any assistance; she never applied for any. Q. Did he not leave a share of a house? A. Yes, sir; there is a share of a house in Third street, but which was not to descend to him until his mother's death. The house is next door to the post office, but she never received any assistance from it, or from any belonging to him. Q. After you left the house, did the china store belong to her? A. Yes, sir; it belonged to Mrs. Carson. Occasionally, as I received my half-pay, I would lend her money to assist her. She laid in capital in that way in her business. Our merchants were very liberal—they opened their books freely, and as she received her money she paid it. She had a running account with them. Browne. Did not Captain Carson sell a watch of hers? A. He took up a watch of hers to the Yellow springs, and pledged it, which was never redeemed. It was a watch that he had given her. I do not know what time it was exactly—it was when he was sailing-master in the navy. In the morning he took a bundle, as we supposed, to go to the Wasp, at the Navy-yard. For two weeks or ten days we did not hear of him. I myself, went to every stage-office, and as far as Darby, to see if I could find any tidings of him. I could hear none until Mr. Tatem, the merchant, returned from the Yellow springs, and told us he was there, which relieved us very much. This was the time he pledged the watch, and then returned with a sailor's round-about jacket and trowsers. Judge R. What do you mean by your half-pay? A. When Captain Baker commanded the Delaware sloop of war, he had the yellow fever in Curragoa. It affected his brain very much, and he returned in that state fifteen years ago last August. The United States then granted him for the injury he had received in their service, half-pay, which is now continued, which is four hundred and fifty dollars a year. Upon my receipt of it, I would tell Ann—Ann, my dear, if you see a bargain, buy it, and if you want one hundred or two hundred dollars, let me know. When I wanted the money back again, Mrs. Carson would repay me. Q. Did Captain Carson repay you? A. No; when Captain Carson returned this last time, all the money he brought with him was six hard dollars and eighty cents, which I sold at Fletcher and Gardner's, and received six dollars fifty for.

The court adjourned till eight o'clock to-morrow morning.

FRIDAY MORNING, 24th MAY, 1816.—Half-past eight o'clock, A. M.

Captain Baker, sworn—

Deputy Attorney General. Relate to the court and jury what you know of these circumstances.

On the 20th of January, about ten o'clock, I came up to the corner of Dock and Second streets, accompanied by Mrs. Baker. When we came there we found Captain

John Carson walking in the store—the house is occupied in that light. Mrs. Baker said to him, addressing him, “*My dear,*” or something of that nature, “let us go up stairs.” We went up stairs, and, I believe, they all sat down except myself—I was standing up by the fire-side. About twenty minutes, from that to half an hour after we had been there, a person by the name of Smith, which I had never seen before, the prisoner, came in at the south-west corner of the room. He had on a blue surtout, double-breasted, or something of that nature. He had his pistol under the left side, and his right hand upon it. From this door which he came in at, he went over to the off-side, and took off his hat and laid it on the sofa. From that he went into the north-east corner. Captain Carson rose up from the fire-side and advanced towards Smith. He observed to him—“Mr. Smith,” I think he called him—“I have had the advice of my counsel, which is that you can’t stay in this house—you must quit this house directly.” He observed to him by having his hands in this position, (*the witness held his hands down by his side, open,*) “My hands are tied, I will not lift the weight of my finger against you.” They were then face to face, and within three feet and a-half, or perhaps four, at a distance from each other. There was at the time a card-table standing at this corner, and Richard Smith had not the room to reach Captain Carson’s face; but he had to lean back in this position (*showing the manner*) to give length to his pistol. He let his pistol fall at the distance of an inch or an inch and a-half from the lips of Captain Carson, and it went off with a tremendous explosion for a thing of that nature, owing to the size of the confined room, I suppose. Captain Carson stood the shock, and inclined shortly afterwards, in a giddiness, I presume, to catch hold of the window frame. The instant he fell down, as it were on his knees, in a double posture, and instantly wheeled himself round under the table and exclaimed; “I am a dead man.” I stood with a kind of astonishment at the terrible act, and was not—it did not strike me to pursue the person. Mrs. Baker, as soon as he fell—but first, Mr. Smith, the prisoner, hove the pistol to one side, and split for the south-west door—Mrs. Baker sprung at him for to stop him, crying out, “Stop the murderer,” or something of the kind; she made a grab at him by the back, but could not hold him; she observed to me, calling me by my Christian name, to pursue him. I went immediately as fast as I could down the stairs, it was a very winding, dark staircase; however, I knew the place very well. As I was going down the stairs I heard a great noise among the china—china-ware, I believe it’s called. Q. Where was the prisoner? A. I’ll come up to him by and by. He got to the door, to the front door; the door opened from the street, what is called inward, and he could not get out without making a passage by. He opened the door and made out, but he had not time to shut it. He got out on the large step at the door, and stumbled off the step into the street. He made a kind of stumble, but did not fall. Rawle. Did you see that? A. I do not recollect that I did. Judge Rush. Did you see him fall? A. Yes, sir; in this manner, I believe I did; (*showing it.*) Q. Were you near enough to see him if he fell? A. I believe I was near enough to see him fall, to the best of my recollection. Attorney General. Did you see him stumble? A. Yes, sir; to the best of my recollection he made a kind of stumble. Q. Did you see his feet strike? A. No, sir; I got up to him and seized him in this position, by his left breast or left neck, or whatever you call it. He at the same time made a kind of a motion of this kind, to get at his pocket for something; but I do not know what it was. The watchman immediately came to my assistance, with several other citizens, in the twinkling of an eye, almost. Q. Had you any struggle with him? A. No, sir; I took him as easily as I would a child of fourteen or fifteen years of age; he made no resistance. Q. Did he make no effort to get from you? A. If he did I did not perceive it; I held him as I pleased. Q. What did he say, sir? A. To the best of my recollection he did not say a word. There was a person came up at the time I had seized him by the collar, with a pair of spectacles on, and a blue coat.

Cross-Examined.—Browne. Captain Baker, you say you went up to the corner of Dock and Second streets on that evening; be pleased to tell what induced you to go there? Baker. I live down Front street, near Pine street. There was a note came, brought by John Carson’s eldest son; I was not at home; I came home; Mrs. Baker was coming to the door to go away.

Temperance Barkley Sworn.—

Att. Genl. Tell the court and jury where you lived in January last. A. I lived at the corner of Dock and Second streets. Q. Who did you live with? A. I lived with Mrs. Carson. On the Wednesday before the accident happened, Capt. Carson came there in the morning and asked where my mistress was. I told him she was not up yet—he went out again—he returned again, Mrs. Carson was not up still. Mr. Smith was up in the parlor. I told him I would go up stairs and call Mrs. Carson, and tell her he was down there. Mrs. Carson then got up and dressed herself, and came down stairs and found Captain Carson there. Mr. Smith, when he found Captain Carson was there, went out. He returned again, and found Captain Carson was still there; he went out again; he

came back again; it was near 11 o'clock, he then eat his breakfast in the parlor by himself. Captain Carson and Mrs. Carson were in the kitchen. Mrs. Carson eat her breakfast about 12 o'clock in the kitchen; Captain Carson was there with her. Mr. Smith came in about two o'clock, and found that Captain Carson was still there; he went out again; he came in again, it was near 3 o'clock; Captain Carson was there still; he then sat down in the parlor talking with Captain Carson; they were talking upon very good terms, about officers on the lakes, and one thing or another. Dinner went in at near 3 o'clock: Captain Carson, Mr. Smith, and Mrs. Carson sat down at the table. Mr. Smith at the head of the table, Captain Carson at the foot of the table, and Mrs. Carson at the side. Captain Carson was sitting there with his little girl on his lap. I went down stairs in the store. I had not been there but a very little while before I heard a great noise up in the parlor. I then ran to the front door to call for assistance, and then I stopt. I heard a great noise—it appeared as if some person was on the floor. Q. The parlor is right over the shop, is it not? A. Yes, sir; I heard the little girl hallo very much up in the parlor. I then ran up stairs to get the child out of the parlor, I met Captain Smith coming out. I then ran to see what had become of Mrs. Carson, I did not hear her. Captain Smith ran down stairs. I ran to the parlor door: I passed it and Mrs. Carson had hold of Captain Carson by the coat to prevent him from running after Captain Smith. As soon as I got the door open Captain Carson broke his hold from Mrs. Carson and ran down stairs. Q. Had he knives in his hands? A. He had them, one in each hand; but he placed the two in one hand and ran down stairs. Mrs. Carson halloosed, "*Richard, Richard fly.*" Sarah made answer, Richard's gone. While Captain Carson was down stairs, I went into the parlor. I cannot say what he said down stairs, I went into the parlor, took Richard Smith's hat off the sofa and went back into the kitchen. Captain Carson and Mrs. Carson went into the parlor. Mrs. Carson put her hand on her breast and told him if he wanted to murder, to murder her; he halloosed "*murder.*" Yes. I went down stairs and asked the little boy who was sitting at the door, where the person went; he said across Dock street. I then knew where he was; I went over to Jonathan Smith's and took his hat to him. Q. Do you know anything of Richard Smith carrying arms? A. Yes, sir, I do. Mr. Smith came into the house that night with a pair of pistols. Q. What night? A. On Wednesday night; on the same day Captain Carson attacked him with the knives; he had them in the kitchen; Mrs. Carson had gone out; Mr. Smith had the pistol by his side; he took the ramrod out of the pistol, threw it into the muzzle, and said it was four fingers; he said there was a bullet in it. He then said, if ever Captain Carson entered the door to lay hands on him, he would certainly shoot him. Q. Who did he say it to? A. He said it in the kitchen; there was nobody else in the kitchen: he knew I was there. Q. Did he say it to you? A. I can't tell, there was no one there but some little children: he did not say it to them. On Saturday morning Captain Carson wrote the note. Q. What happened on Thursday? A. On Thursday I believe Captain Smith bound Captain Carson over. Q. Were they both there that day? A. No, sir, Captain Smith was there; he was very sick, he could not go to Judge Badger's office until the afternoon—he was sick several days before Captain Carson made the attack upon him; Mrs. Carson had been giving him physic. On Saturday following, Captain Carson wrote up a note by his own son William to Mrs. Carson, wishing to see her at her house, corner of Dock and Second streets. She then sent him word she would be at leisure between eight and nine o'clock, she wrote a note by her son William. Captain Carson, instead of coming between eight and nine, came between seven and eight in the evening: Mr. Smith was then in the parlor with Mrs. Carson. A young girl, Sarah White, was down in the shop and came up and told Mrs. Carson Captain Carson was down in the shop and wished to see her. Mrs. Carson went down to Captain Carson and brought him up. Mr. Smith went into the kitchen. Mrs. Carson after she came up into the parlor with Captain Carson, came into the kitchen and asked Mr. Smith if he would not take tea; he said no, he would go and stay at Jonathan Smith's till Captain Carson went away. Mrs. Carson came out after awhile and took tea herself, Captain Carson with her; when she sat down she asked Captain Carson if he would take tea? he said he had already taken tea at his mother's. After Mrs. Carson was done tea, she returned to the parlor again, Captain Carson with her. I went in after awhile, Captain Carson was walking up and down the parlor floor. After awhile—a good bit, Mrs. Carson came and called me to get her clothes, I got her coat and hat; she came out into the kitchen—she has a little red box which she keeps her money in, she opened it, took some money out, and put it in her reticule. I then, sir, followed her down to the shop; she told me if she would not be at home that night, I must not be alarmed at her staying out. I then asked her why? she told me Captain Carson was come to take possession of the house, she was going out to find Mr. Smith; she said she would not wish Captain Carson and Captain Smith to meet again on account of what had happened before. She then went out and staid a good while, and then came back again to persuade Captain Carson to go home. He would not. I forgot something before—Captain Carson sent his son down for Thomas Baker, be-

fore she came in the last time. Mrs. Baker and Captain Baker came up to the corner of Dock and Second streets, Captain Carson was then walking the store. I cannot say what Mrs. Baker said to Captain Carson in the store. I went up stairs, Mrs. Baker, Captain Baker, and Captain Carson, went up into the parlor. Mrs. Baker was sitting near the front window, near the fire-place, Captain Carson sat in the middle near the fire. Mrs. Carson came in the last time, ran up stairs and came into the parlor. I was sitting in the kitchen, when Mrs. Carson came up, I went into the parlor to see what was the matter. Mrs. Carson was there trying to persuade Captain Carson to go home; he would not go home. After Mrs. Carson was in there a good bit, I came out to get some wood to put on the fire, I went into the parlor again, Captain Carson had his little girl on his knee; I then took the little girl off his knee to put her to bed; Mrs. Carson was then trying to persuade Captain Carson to leave the room. I staid there for a good bit, after awhile Mr. Abbott came in; I waited with the child in my arms. Mr. Abbott went into the parlor and stood with his back towards the dining table. He had not been in there more than a minute, or a minute and a half, before Mr. Smith came in; Mrs. Baker was then talking with Mrs. Carson, asking her if she could live in a state of adultery with that *wretch*. In the mean time, while she was saying the *wretch*, Mr. Smith entered the door. Mrs. Carson answered, it was no fit time of the night to talk about that. When Mrs. Baker said "the *wretch*," I happened to look up in Captain Smith's face, and saw that his countenance was very much altered. When I saw Mr. Smith's countenance was changed, I took the child and ran down stairs to the street door. Edward Ingersoll.—Before you go further, describe the change in his countenance? A. I can't well say, sir; I saw his countenance was changed; I can't exactly tell how he looked, he seemed very much agitated. Edward Ingersoll.—Can you tell us how agitated? A. I can't well tell, sir; he seemed to be angry. Q. Did you say, this change was the reason of your running down stairs? A. Yes, sir; his son John Carson was standing at the door; I told him I was afraid something would happen, from the change in his countenance. (*This reflection objected by the court.*) I ran back to the door and found some person in the shop, I could not tell who it was until he got to the front door. Q. Did you hear any noise? A. I heard a scrambling in the shop. Q. Did you hear anything up stairs? A. O yes, sir; I heard the pistol go off. Mr. Smith got out by the lamp-post, there was a crowd around him. He went away—I did not see any thing more of him. Q. How far was he from the door, when his countenance changed? A. About two yards from the door.

Cross-Examined.—

Browne.—You said that on the previous Wednesday Mrs. Carson called down to Mr. Smith, "Richard, fly!" that Sarah White was in the store, and answered, "Richard's gone?" A. Yes, sir. Q. You have also stated, that when Mrs. Carson said to Captain Carson, that if he wanted to murder her, he said—"murder." Yes! What were his gestures at that time? A. He had the knives in his hand, and looked very angry; his eyes were almost starting out of his head, he was almost double with anger. Q. Did his voice indicate anger? A. Yes, sir; very much. Q. I think I understood you to say, that Captain Carson and Mr. Smith dined together that day. Did they drink together that day? A. Yes, sir; several times; I took the water into the parlor. Q. You say Mr. Smith came out of the door, and went down stairs. Did he go quickly? A. Yes, sir; pretty fast. Q. Did you look at his countenance? A. No, sir. Q. Did you observe whether he looked alarmed or not? A. No, sir; I was afraid myself. Q. State whether you ever saw Captain Carson walk round the door? A. Yes, sir; I did. On the Saturday night before this happened, I was shutting up the shop; I saw Captain Carson go past the door pretty fast, I then said to Mr. Carson's son John, "There goes your father." I wondered what he was doing out so late at night—it was half past ten o'clock—I went to the corner; I saw Captain Carson on the opposite side of the way, behind a poplar tree; I saw his coat. Q. What was he doing there? I can't tell, sir. He was looking up at our window. Q. Did you ever hear him make any declarations that he would do Smith violence? A. No, sir; I never heard him make any. After I went to the corner, he went up Dock St. I then went up stairs, and told Mrs. Carson I saw Captain Carson standing on the opposite side of the way, and look up at our window. She was a good deal alarmed. Q. Recollect yourself, if you did not hear some expressions against Smith? A. No, sir; I was scarcely ever in the room when he was there. Q. Was there ever a pair of pistols in the house before Captain Smith brought those you mentioned home? A. No, sir. Q. Was there any other weapon? A. No, sir. Q. When he brought the pistols there, where did he keep them? A. I believe up stairs in the closet. He never carried them after he bound Captain Carson over. Q. You have mentioned that Mr. Smith several times came home and went out again. Did he take any pistols with him? A. I did not see him. Q. What time did you say Mr. Smith went out on the 20th? A. He went out immediately after Captain Carson came in. Q. Did he take any arms with him then? A. I did not see him take any. Q. Were you not

sent to warn Mr. Smith of his danger from Captain Carson? A. I do not recollect whether I was or not.

Dr. Dorsey sworn.—

Dep. Att. Genl. Will you please to describe to the court and jury the wound Captain Carson received?

Dorsey. I must necessarily give you a short account of Captain Carson's case, if I am not suffered to refer to a memorandum I took at the time, and which is very full. On the 21st January I was requested to visit Captain Carson, in consultation with Dr. Rush. I saw Captain Carson for the first time on Sunday, which I believe was the 21st of January. The information received was, that the night previous he was shot with a pistol. Upon examining the situation, I found his face burnt, his eyebrows and eyelashes singed, particles of charcoal from the explosion of gunpowder, driven into the face; circumstances which proved the firing of the pistol very near his face. Captain Carson at this time was in perfect possession of his intellectual powers, and appeared to have suffered very little from the accident. He continued in a condition not apparently alarming, for several days. On the Thursday, Friday, and Saturday succeeding the accident, in the evening, he was attacked with delirium occasionally. He continued thus until after Saturday night; he appeared manifestly worse during the next week, and on the fourteenth or fifteenth day of the wound he expired—if I am not mistaken, it was on the fourth or fifth of February. The next morning at nine o'clock, at the request of the coroner, I dissected the body in the presence of Dr. Rush, Dr. Physick, and Dr. Niel, and also in the presence of the coroner and his inquest. The brain exhibited evident symptoms of inflammation. From his mouth the ball appeared to have passed in a direction backwards, carrying away the two upper teeth, and was found lodged in the upper bone of the spine, for which there is no English name, but which we call the *atlas vertebra*. The bone was considerably flattened and shattered. The ball was found surrounded by matter and fragments of the bone. Q. Is that the ball? (*showing one.*) A. Yes, sir; I believe I can recollect it with perfect accuracy. This is the one, or one very like it. Q. What is that, sir? (*showing a piece of bone.*) A. It is a part of the bone.—The ball entered at the mouth, there was no external wound; it is the only instance in which I have found no external wound; for the burning and singeing of the brows I spoke of, were the only evidence of external injury; there was no injury on the body of Captain Carson. This is the only instance known in which the three spinal bones were injured, that there was not immediate death; nor have I, nor any of my medical friends, read of a similar instance. If we had known the extent of the wound, we never would have entertained hopes; but we had expectation of his recovery, and Captain Carson was encouraged by us to think he would get well; and I can assure the court, that on the fourth or fifth day of the wound, Captain Carson's mind was free from the apprehension of death. (*The doctor was shown a paper.*) The fifth February we made the dissection; of course he died on the fourth February.

Dr. Rush sworn.—

On the 29th January in this present year, between ten and eleven o'clock at night, I was requested to visit Captain Carson. I immediately followed the messenger to the corner of Dock and Second streets, where I found Captain Carson lying on the floor of his parlour, with the marks of a gun-shot wound on his lips. The dangerous bleeding had ceased, and I gave the necessary directions for his treatment. I continued to attend him, in consultation with Dr. Dorsey and Dr. Physick, until the day of his death, which occurred on the fourth of the succeeding February. The body of Captain Carson was examined the next day after his death, and dissected by Dr. Dorsey, in the presence of Dr. Physick, Dr. Niel, the coroner's jury, and myself. From that examination and dissection, I plainly saw the leaden ball, lodged in the neck. It was a ball of moderate size. Q. (*showing it.*) Is that it, doctor? A. It was about that size, and flattened as that is, exhibiting the appearance of having passed through a bone or solid substance. Q. (*Handing him a piece of bone.*) Do you know what that is, doctor? A. It looks like a piece of bone. The ball appearing by these marks, to have entered the mouth, leaving on the lips a slight impression, tearing away the two fore teeth, shattering the tongue, and finally resting on the bone of the neck, technically and specifically called the *atlas vertebra*. It had not reached the spine, which is in the middle of the neck; it had only reached the spinal marrow; it was, therefore, in the front part of the neck; the ball rested upon this place, surrounded by fragments of bone, occasioning an injury in a highly vital part; an injury sufficient to cause the death of the patient. Q. Was it on the bone of the neck? A. The bone appeared to have been broken into many pieces; I do not know how many, but amidst these fragments it was lying. Q. Do you consider the spine as lying in the back part of the neck? A. When I spoke of the front part, I spoke of the solid structure of the neck; it was near the fleshy part of the neck. Judge Rush. Do you suppose he died of this wound? A. I believe he did. During the first days of his illness there were expectations of his recovery, arising, however,

from our ignorance of the passage of the ball. If we could have known by Captain Carson's being able to open his mouth, we could not have hoped for his recovery. Q. Is not a man of intemperate habits exposed to greater dangers than a temperate person? A. All cases of disease are more dangerous with an intemperate man; but, in this case, there were sufficient effects of disease to produce the death of the most temperate man on earth. Q. Is a man of intemperate habits more liable to delirium than another person? A. Yes, sir. Att. Gen. Is not a weak man, doctor, more liable to delirium than a strong one? A. I do not know, sir; strong persons are as liable to delirium as weak ones; there is no rule that I know. Q. Did you know Captain Carson in his life-time? A. No, sir. Q. Was he a large muscular man? A. I believe he was, sir. He was large in stature, and fleshy; but whether muscular or not, I do not know. Q. Were there any indications of intemperance from the time you first saw him? A. No, sir.

Samuel Ewing, Esq. sworn.—

Q. Had you any conversation with the prisoner shortly before the 20th January?

A. I had a conversation with Captain Smith on the morning of the day he went to Judge Badger's office. I do not exactly recollect the day; it was on the Thursday or Friday before Captain Carson's death. The conversation which I had, passed in the office of Judge Badger; I attended there as the attorney of Captain Carson, at his request. I will not pretend to state the words that passed, but the substance I can repeat. Captain Carson was brought, and I attended at Judge Badger's that morning, in consequence of a complaint that had been made against him by the prisoner at the bar, who wished Captain Carson bound over to keep the peace, and I went with Captain Carson as his attorney, to defend him. If I recollect right, Captain Smith made the oath usual on these occasions, that he was in danger of his life, and mentioned the reason; a circumstance that had occurred a day or two previous, at the house of Mrs. Carson; an attack made upon him by Captain Carson with a knife, at the dinner table. I think Captain Carson asked, and was allowed by the Alderman, opportunity to explain the circumstances. Captain Carson mentioned, it was not his intention to hurt or strike Captain Smith, but merely to frighten him out of the house; Captain Carson mentioned that his feelings were very much irritated at seeing the prisoner, Captain Smith, in the house, which Captain Carson considered his own, assuming the command over the servants and children at the dinner table; and that in consequence of these feelings being excited, he suddenly seized the knife that was lying before him on the table; used some strong expression toward the prisoner, I forgot the expression he said, and made an apparent attempt, as he said, to strike Captain Smith with the knife, but without any intention of doing it, but merely to frighten him. Captain Smith, as Carson said, ran behind Mrs. Carson, and Captain Carson sat down again. It was upon that statement, and upon the impression I had, that Captain Carson had a right,—(stopped by the counsel for the prisoner.) I then took occasion to remonstrate with the prisoner at the bar, against his being in that house; I told him that he was not the husband of Mrs. Carson, and had no right to live with her; that her husband was living; that his marriage with Mrs. Carson was void; and referred him to the act of Assembly. If I recollect right, the gentleman who attended as Captain Smith's counsel upon that occasion, Mr. Jonathan B. Smith, said the marriage was legal, Captain Smith himself, in consequence I suppose of that, said also the marriage was legal. I asked Captain Smith, the prisoner at the bar, whether he did or did not know, that her husband was living; his answer was that he did not know anything about it himself, but heard that she was a fine widow, with three or four children. I asked him, whether at the time he married her, he did not marry her by the name of Carson, and whether, seeing the children there, did not remind him that she was a married woman; and whether these circumstances did not lead him to inquire whether she was married. Captain Smith rather objected to answering; he said some of my questions were illegal; he referred to his counsel; his counsel told him not to answer such questions, and he rather declined answering them. I asked whether he knew or had known Mrs. Carson twenty-four hours before he married her; his answer was, he was introduced to her on Saturday, and married her on Sunday; there was some more conversation before Captain Carson was bound over, I believe in a recognizance of five hundred dollars; I will not be certain as to the amount; but Captain Smith seemed, towards the conclusion of the conversation, to have doubts of the legality of the marriage.—(Stopped by the prisoner's counsel, and desired to tell the words that passed.) I am now at that part of the conversation when the prisoner was in the entry alone. Mr. Browne, (Objected to the relation of what passed in the entry when Mr. Smith was alone.) Mr. Ewing has stated he was the counsel of Captain Carson; I would ask him whether he did invite Mr. Smith out in the entry, and whether Mr. Smith went with him as counsel; if he answers in the affirmative, I object to his now disclosing anything there confided to him. Q. Did you not invite Captain Smith out into the entry to give him advice? A.

Yes, I touched him in the room, and invited him into the entry. Q. Was it not to give him legal advice? A. I considered it more friendly than legal. Q. Was it not upon legal principles? A. Yes. Browne. Then certainly, your honour, what was declared by Smith in the entry, was in confidence, and Ewing was there as counsel. Att. Gen. I cannot distinguish the difference between the public and private conversation. But we do not wish Mr. Ewing to disclose anything confided to him as counsel. Did not Mr. Smith know you were the counsel employed against him? A. He certainly knew I was employed against him. Browne. Mr. Ewing invited Mr. Smith from his counsel, into the entry, and anything he said there, was as much in confidence, as if it had been said to a hired counsel. A hired counsel is sworn to do his duty, but here, where there was an invitation, an offer of legal advice, Captain Smith reposed as much confidence as if Mr. Ewing had been hired counsel.

The court were of opinion that the evidence must be heard. The witness proceeded. I took Captain Smith into the entry, with a view and hope to persuade him to leave the house. Browne.—Mr. Ewing, you must not state your views and hopes—you know you ought not. E. I do not, sir; begging your pardon. B. You ought to know it, sir. E. I think not, sir. It was intimated by the counsel, that my taking Captain Smith into the entry, was with a view of giving legal advice. I told Captain Smith he must now be satisfied, he had no right to live with that woman; that he now knew she was a married woman, her husband was living, and had returned; that Captain Carson could not bear to see him in the house which Captain Carson thought his own, with his wife and his children; and that to avoid all disputes between himself and Captain Carson, he had better leave the house. Captain Smith said, he had a right to be there, and would not go away. I again repeated to Captain Smith what I have mentioned; expostulated with Captain Smith about the propriety of his being in the house, and advised him to leave it; and he finally told me that he would go away to Kentucky, I think he said, on the following Monday or Tuesday; I think this conversation happened on Thursday or Friday. I told Captain Smith he had better go away at once, and then left him. Q. Do you recollect any contemptuous language used by Carson? A. Yes, sir, I recollect clearly and distinctly, that when the attempt was made, Carson said, "You damn'd scoundrel, or you damn'd rascal," or something of that kind. Q. Did not Smith say, Carson said, he went behind Mrs. Carson as a coward? A. I have some recollection that something of the kind did happen. Q. Were you the only counsel of Captain Carson? A. There was no other that I knew of; I believe I was the only one. Q. Did you advise him to take possession of that house on the 20th? A. No, sir, I never advised him to take forcible possession of that house. Att. Gen. That was not the question. E. My advice to him was to keep away from the house. To act peaceably and quietly until he got the title papers from his wife. This was the advice I gave him for nearly two weeks.

Mrs. Maria De Gorgue sworn—

Dept. Att. Gen. Relate, Madam, any conversation that passed in your presence between Mr. and Mrs. Carson. Witness. I know nothing of Mr. Smith more than the greatest stranger on earth. My husband has been acquainted a long time with Captain Carson and his family. Q. Have you ever seen Mr. Smith? A. I saw him at my house, I think on Friday before the circumstance occurred; I believe he got some medicine from my husband. Nothing took place except that he got the medicine. I never heard him say anything respecting the business, except when he last called; then he spoke of having some dispute with Mr. Carson. Q. Do you know anything of a letter written by him? A. I saw a paper given by Mr. Smith to Mrs. Carson. Att. Gen. (*showing a paper.*) Is that the paper, Madam? A. I think it is, sir. Q. Did he give it to her? A. I was in the store at the time Mr. Smith came down stairs, and had a paper folded in his hand; he merely handed the paper to Mrs. Carson, and said, "Read that when you are alone." Q. What time did this happen? A. I think it was on Thursday. Q. Do you know what were the contents of the note? A. I am certain, sir, I read the paper; I was requested to read it by Mrs. Carson; I did so: it was a request to make up certain sums of money, and there was a note on the table.—(The Dept. Att. Gen. read the letter, which was as follows:)

"Account of moneys which I have received from my dear Ann, since I had the pleasure of knowing her,—thirty-five, ten, five, five, in all amounting to fifty-five dollars since our connexion—too proud to ask any favours from my relations, and it being my determination never to oppose your wishes, whose happiness is dearer to me than life; I contemplate the moment, the fatal separation takes place, to leave town; it may give peace to my Ann, the only woman I ever loved, and the last.—My destination will be Lexington, Kentucky—I have had several invitations to join my cousin—to remain here and be the scoff of my own connexions, I never will—my heart is too big to say more. You know me, and that is saying volumes. But to accomplish my wishes, my dear Ann, it is requisite I should ask of you to make my pecuniary debts amount to \$200, promising

to discharge soon after my arrival in Lexington; the sooner you can let me have it the better.—Good God! that I should be what I am. I cannot eat with you—my soul is nothing—I will see you before three o'clock."

Your ever affectionate and loving husband,

RICHARD SMITH.

(There is no date to the letter.)

60 days after date, I promise to pay, either in Lexington, Kentucky, or in the city of Philadelphia, to or order, two hundred dollars. Value received.
Philadelphia, Jan. 18, 1816.

RICHARD SMITH.

Temperance Barclay again called.

Q. Did you hear any conversation between Mrs. Carson and Captain Smith on Saturday morning? A. Yes, I did; Mrs. Carson wished Captain Smith to go and board out. Captain Smith told her he had no money at present, he could not think of living on her money. She wished to pay his board. I cannot exactly tell you the words. I just heard it as I opened the door.

William Tyson, black man, sworn.

Att. Gen. Tell the court and jury whether Captain Smith said any thing to you immediately before the death of Captain Carson? A. Mr. Richard Smith sent me for two balls—pistol balls. Q. When was this? A. At night, sir. Q. How long before?

A. I can't exactly tell. I believe some days before, at night. Att. Gen. We shall rest the prosecution here, unless it is necessary to adduce further testimony to rebut *Browne*. I wish to ask Mrs. Baker a further question, which I will now take the opportunity of doing.

Mrs. Baker, called again.

I have heard Captain Carson say, he would take Captain Smith and serve him as they served them in Scotland; he would take a big stick and beat him. This was some time after Captain Carson came to my house. I do not know exactly the day. Q. Do you not know of Captain Carson's way-laying Mr. Smith? A. The Saturday night before the accident happened, Captain Carson heard that Mr. Smith was at Mr. Sergeant's tavern; he put on his hat and went out. When he returned he told me he went to Mr. Sergeant's tavern to hunt Captain Smith, but when he went he was gone. Q. Did he say anything about knocking his blue eyes into black ones? A. I am not certain, but I think he used some expression of the kind. The court adjourned.

FRIDAY AFTERNOON, 3 o'clock, P. M.—Att. Gen. I beg to mention to the court, that I wish to put one question to Mrs. De Gorgue I omitted in the morning. I have sent for her. A number of questions were proposed by the counsel last night without explaining how the testimony was to be used—I am left to conjecture. If it is to show that the prisoner had a right to remain in that house, in consequence of his marriage with Mrs. Carson, then it would be proper to know how Captain Carson acted. I propose this question for Mrs. De Gorgue. Whether she was present at an agreement entered into by Captain Carson and Ann Carson to live together; when it was, and what it was. Mr. Rawle wished to know what time this supposed agreement was made. Att. Gen. Within two or three days preceding his wound, probably about the 18th; the letter which I suppose was a consequence is dated the 18th; I therefore suppose this agreement to have taken place about the 17th or 18th. Rawle. We consider it better to postpone this evidence, as the lady is not present, until we have gone through our case. We will not object to the time. Att. Gen. I have no objection: provided the time is not objected to.

Mr. Browne then opened the defence.

If your Honours please, Gentlemen of the Jury. So uncommon an occurrence is it, to be concerned in the trial of an issue, where the life of a valuable fellow-citizen is at stake, that I may promise myself your most serious attention; and if we have shown an anxious desire to arrest the time in this all-important case, and zeal to lay the whole evidence before you, to establish our defence; we hope this you will receive as a full and ample apology. We labour, gentlemen, on the present occasion, under very considerable difficulties, which are not felt on the side of the prosecution. On their side, they have had opportunity to examine the circumstances, to see and examine witnesses, and know what evidence was to be brought before you; and on our side, we have had none of these advantages; we come in a manner unprepared; we were ignorant of what evidence would be adduced against us; we were even unacquainted with the nature of the charge; and did not see the indictment until it came before the court. I trust we will find in the jury a proper consideration on this subject, although these are not the only difficulties under which we labour. It has been very properly hinted at, by the Attorney General in his opening, that this case has excited not only curiosity, but indignation; this, it is impossible can operate with you, against the prisoner. No, gentlemen, I flatter myself, that whatever you have heard as citizens, when you have once taken possession of that box, you will abandon every idle story you have heard out of doors; that you will decide

merely upon the evidence adduced at this bar; that you will not consign a valuable fellow citizen to disgrace and an ignominious death, without fully weighing every circumstance alleged both for and against him; and that you will well examine also, the answer, perhaps fatal answer, (if you do not properly and with care consider the case,) the which may bereave your fellow creature of life. Richard Smith was born in Ireland. His father, Samuel Smith, was a respectable inhabitant of the town of Sligo. Young Smith had the misfortune to lose him while in his infancy, and his mother contracting a second marriage, he, at an early age, emigrated to this country. He arrived at Philadelphia in the summer of 1803, and thus, in a strange land, was "launched into life without an oar."

"No mother's care shielded his infant innocence with prayer,
No father's guardian hand his youth maintained,
Called forth his virtues and from vice restrained."

He was put to school, and remained in or near Philadelphia until 1807, when he was sent out to New Orleans, and placed under the protection of his maternal uncle, Daniel Clark, formerly a member of Congress from the territory of Louisiana, but better known to the citizens of Philadelphia, for his unexampled humanity in cruising in a leaky vessel, for the crew of the ship *Arago*, which was wrecked on the Bahama Banks, and at the peril of his life, and risk of losing a valuable vessel and cargo, (the insurers of which were discharged by the deviation,) snatching from the jaws of death a number of our valuable fellow citizens. Oh! how unlike that generous, humane and disinterested uncle, is the hideous picture now drawn of the nephew.—How unlike the public festival with which Mr. Clark was justly honoured by your city, is the degradation of his memory in the public trial of his only male representative on this side the grave! But, to return from this digression. Being adopted by his uncle, who to immense wealth added great political consequence, young Smith was regarded as his heir apparent. With these flattering prospects he commenced his acquaintance with the world. Thoughtless and unreflecting, flattered and caressed by the friends and dependants of the then powerful Daniel Clark, he imbibed ideas illy calculated to support him through the scenes of sorrow and adversity that have succeeded. Scenes that have chilled the hearts of some of the warmest of those friends. Nor was this the only disadvantage under which young Smith at that time laboured. Mr. Clark, with one of the warmest hearts that ever animated the breast of a true born son of Erin, had a heart least calculated to enhance the value of the favours he dispensed to all around him. He gave with a liberal hand, but his favours seldom secured him lasting attachments. He expected too *great*, and received too *little* return from those who rose to eminence upon his patronage. With regard to Smith, he was still more unfortunate, attached to him by all the ties of blood and friendship, he expected from him a steadiness and gravity of conduct totally inconsistent with his years and education, and Mr. Clark's disappointment, on the one hand, and the independent spirit of young Smith on the other, were the only things which in a small degree interrupted the harmony that should have existed between them. Thus circumstanced, young Smith sighed to be released from the golden cage in which he was confined; but gratitude to his benefactor for the time restrained his inclination. We have now traced him to that period when our country, wearied with the injuries that had been heaped upon her by the transatlantic rulers, resolved to appeal to the last resort of nations, and to emancipate her sons by the power of her own arms. You will all remember the fire that at that interesting period burned in every young American bosom; how the native and the adopted citizen emulated each other in their ardour to be foremost in the ranks. Young Smith's heart caught the sacred flame, and with such vigour did it blaze, that he instantly burst asunder all the chains that bound him to the mansion of his adopted parent. Then only 18, he repaired immediately to the city of Washington, and having been introduced to the secretary of war by James Brown, the senator from Louisiana, on the 3d of May he received an appointment of lieutenant in the 23d regiment, and went immediately to the seat of war. His regiment was then under the command of Colonel Brown, but that gentleman soon after retiring from service, the regiment for the remainder of the campaign was consolidated with the 6th, under command of brevet Colonel, now brevet Brig. Gen. Miller. Although nothing brilliant was achieved during this campaign, still it was an active one; the Americans were obliged to be continually on the alert, as the main body of the British army under the orders of Major General De Rottenburg were intrenched within three miles of their camp, and there was continued, during the whole time, a *petite guerre* of out posts, frequently surprising and cutting off pickets; and, so far, as opportunity offered, Lieutenant Smith showed himself worthy of the commission with which he had been honoured. It did not fall to his lot to share the laurels, but by his general good conduct and co-operation with his gallant companions in arms, he assisted in redeeming from obloquy the American name. In the fall of 1813 General Wilkinson took command of the army. Smith

obtained a furlough for two months, and on its expiration he was ordered on the recruiting service. During the winter he was appointed adjutant of the recruiting district. In the spring of 1814, news arrived at Utica (N. Y.) where Lieutenant Smith then was, that Sackett's Harbour was attacked. Smith left Utica with 120 recruits, 60 rounds of ammunition, and 3 days' provisions and in 40 hours they were at Sackett's Harbour, a distance of 80 miles. For his promptness and good conduct on this occasion he received the thanks of General Gaines, who, afterwards, in a letter to his Colonel which was published in the *Aurora*, spoke of him in handsome terms. Sometime afterwards an order was issued for the consolidation of the battalion to which he belonged with some others, the whole to be under the command of Major Lyman, the senior field officer present, and by the recommendation of General Gaines, Lieutenant Smith was appointed adjutant, and from that time, (except when prevented by sickness) he continued to perform that duty; until (wishing for more active employment) he applied for and obtained an order to join the army under General Brown, then besieged by a vastly superior force under General Drummond. With this division he remained until the army went into winter quarters. In the winter he was employed on a special mission, and performed it to the satisfaction of his superior officers. I have been thus particular in tracing Mr. Smith, because, among other falsehoods industriously circulated with a view to prejudice his trial, it has been reported that he was disgraced in the army. We challenge the inquiry, and will adduce such honourable testimonials of his bravery and good conduct during the whole time he was in the service, as will admit of no contradiction or doubt upon this subject. The return of peace, though pleasing to Mr. Smith in common with the rest of his fellow citizens, did not better his situation. While he was in the army he had met with, in the death of Mr. Daniel Clark, one of the heaviest misfortunes that could have befallen him. It was not until the derangement of the army, and Smith's return to civil life, that he felt the full weight of the loss he had sustained. Educated to no profession, with no relations, few friends, and slender means of gaining an honest and honourable livelihood, he was reduced to a distressing situation. Let it not then be objected to him that he married the lady upon too slight an acquaintance, that he neglected to make all those prudential inquiries and arrangements which an older man, and one differently circumstanced, would have done. Considering his inexperience and situation suffice it that he was assured that she was free from any pre-engagement.

They were married at Frankford, on the 15th day of October, 1815, by the Rev. Mr. Doak.—The lady had acquired the character of a *feme sole trader* by Carson's desertion. She had rented the house at the corner of Dock and Second streets, in her own name, and had power, by the act of Assembly of 22d February, 1718, to acquire and hold property independently of her husband; she became liable to be sued and imprisoned for debt, and had actually been confined in the Debtors' Apartment of this city.—The marriage of Smith with the lady having taken place, upon false rumour in appearance well founded of the death of Mr. Carson, *he having been absent two whole years*, was, in some respects lawful by the divorce law of Pennsylvania. The lady was not liable to the pains of adultery. And Smith acquired the possession of the house and other property, and became liable to pay such debts as she had contracted.—Soon after the marriage Smith came there and reduced his right to the house to possession; from that time he remained there and was looked upon by every body, as he was in law, the master of the family.—Even Mrs. Baker, the mother of the lady, recognised him as her son-in-law. She saluted him, called him her dear son, and wished him joy.—By her frequent visits at the house, and familiarities when there, she, for some time, gave the strongest testimony of her approbation of the match.—This state of quietude was not, however, of long duration. Mrs. Baker and Mr. Smith had an unfortunate dispute about pecuniary matters, and the old lady taking offence at some expressions of his, it implanted in her a hatred and desire of revenge which nothing could allay.—In this unfortunate state of affairs, Carson unexpectedly arrived from Europe. He was ignorant of the second marriage, but had been absent so long without even writing to his family, that he would not go to the house. He proceeded to Mr. Baker's, and there, it is natural to suppose, he received no favourable impression of Mr. Smith.—Here let us pause for a moment and examine the course pointed out to Carson by law. We shall find it reasonable in its terms, and ample in its provisions.—The second marriage was, as I before said, in some respects lawful. The lady was not liable for the pains of adultery, and Smith acquired dominion over the property; but it was in the election of Carson to dissolve this connexion that existed between them, and have his wife restored, or to have his own marriage dissolved, and the lady remain with the second husband.—But this was to be done not by his own act merely, but by a suit or action instituted for the purpose, within six months after his return, in which the court might decree accordingly.—Until Carson declared his election by instituting the suit, the possession of the lady and the house remained in Smith.—Such action claiming the restoration never was brought; but on the contrary, Carson, on the 15th of January, 1816, formally and legally renounced and

abandoned all right to her and her possessions, by petitioning for a divorce from the bond of matrimony.—On the 16th January, the next day after Carson had made his *election*, he came to the house which was thus in the legal and peaceable possession of Smith, and committed a most unprovoked and violent outrage upon his person, attempted to murder him with deadly weapons, and forcibly expelled him from his home.—At this time Smith had no arms; he had no occasion for any; he was at peace with all mankind, and had done nothing justly to excite the displeasure of any one.—As the circumstances attending this unwarrantable attack and expulsion have, it is conceived, a material bearing on the decision of this cause, I shall be excusable while I place them more in detail before the court and jury.—When Carson came to the house he disavowed all hostility, and by that means put Smith off his guard; he sat down to the table with Smith, ate with him, and drank with him, and conversed with mildness and pacification. Having by these means completely lulled to sleep any latent apprehensions that might exist in Smith's mind, Carson suddenly inquired of him whether he was armed, and being answered in the negative, he arose, seized a carving-knife, and aimed a deadly blow at the most vital part of Smith's body. The knife entered his coat, and would have been fatal in its consequences, had it not been for the exertions of Smith to avoid the blow, and the timely interference of the lady, who threw herself between them. Carson seized another knife in the other hand, and Smith saved his life by flying to a neighbouring house, without his hat. Carson, armed with the two knives, followed Smith down stairs, and loading him with imprecations, expressed his regret that he had not effected his bloody purpose.—Smith immediately applied to Mr. Alderman Badger, and took out a warrant, but the hearing did not take place until the 18th of the same month.—In the interim Smith learned that Carson had made threats of further injury, which induced him to borrow a pair of pistols to defend his life.—Every man has a right to keep and use arms for his *defence*, and it will appear that this was the only object Smith had in view. On the 18th January, when the hearing came on before Mr. Alderman Badger, Smith stated the conduct of Carson, and Carson did not deny the charge or circumstances. He pretended that it had been the effect of sudden passion, and disavowed *then* harbouring any intention to do him an injury; but what evinced his insincerity in this respect, was the provoking and contemptuous language with which, (as we shall show you,) in the face of justice, he endeavoured to excite Smith to acts illegal and bloody; but which his inexperienced and warm mind, with false notions of honour, might deem justifiable.—Carson was recognised to keep the peace and be of good behaviour, himself in five hundred dollars, and gave a surety in the like sum. This step of “preventive justice,” as Blackstone calls it, being had, it was reasonable to suppose that the public peace would thenceforth be preserved; and this reasonable expectation would have been realized, if Mr. Carson and his surety had complied with the terms of the obligations they had entered into. This was not the design or intention of Mr. Carson, as will appear in the sequel. He was bound by his recognizance to refrain from, not only such acts of violence as would be offensive to Smith's person, such as assault, battery, and imprisonment, but also from trespasses on his possessions, in his presence all forcible entries on his real estate, and even from provoking and offensive language to him or in his presence, as challenge a breach of the peace; not only were his *hands* tied, as he expressed himself, but so also were his *feet* and his *tongue*.—Into the house of Smith, without his previous invitation or consent, he should not have entered on any pretence whatever; out of it, as soon as he found himself an unwelcome visitor, he should instantly have gone without hesitation or delay.—On the evening of the 20th of January, only six days after he had attempted the life of Smith, and four days after he had been recognised to keep the peace, to the same house of Smith, unasked, uninvited by Smith, he repaired, with the avowed intention of taking possession. It was about seven o'clock in the evening. He came as before, with words smooth as oil on his tongue, but with falsehood and revenge in his heart. Smith would have been perfectly justifiable in expelling him from the house, and had he harboured any injurious intentions against him, never was a more favourable opportunity of putting them in execution: but trusting that mildness on his part would set a good example to Carson, and hoping that if he were permitted, for a short time, to converse in private with the lady, he would afterwards quietly retire, Smith went out and left him there.—He took with him no weapon of offence; he meditated no mischief; he brooded over no murder; but spent his evening with a friend, in a social and innocent manner.—Returning home about ten o'clock, he was met by the lady, and learned from her the circumstances that had transpired after he had left the house. That Carson, having obtained admittance to the house under the garb of the *lamb*, had immediately after his departure, thrown off the covering, and shown himself in his real character of the *wolf*; that he had acknowledged that he came with the illegal intention of taking possession of the house, and *remaining* with Mrs. Smith all night, and after threatening and abusing her, had finally turned her out of doors to brave the pitiless storm in that inclement night. A person

possessing more prudence than is allotted to Smith, and one bound by weaker ties than those by which he was allied to the lady, would have been roused to vengeance by such a tale of woe.—It will therefore excite some surprise to find that he was anxious to avoid an encounter with Carson. He persuaded the lady to go with him to his lodging, but this she declined.—They then went to the office of J. B. Smith, to take his advice. He recommended a warrant to be taken out, by virtue of which Carson might be dislodged by a peace officer, and Smith furnished another and a very strong evidence of his desire to avoid a meeting with Carson, by going in search of a warrant and constable. In the meantime the lady went over to the house, and found Carson still there, accompanied by Mr. and Mrs. Baker, whom he had sent for to aid him in taking forcible possession of the house. This measure he falsely asserted was done in obedience to the direction of his counsel.—His counsel never gave him any such advice; and no such advice, if given, would have justified the measure.—Unfortunately for all parties, no alderman or constable was to be found at that late hour of the night.—I omitted to mention that the lady brought with her, when she first came out, one of the pistols from Smith's bed-chamber, where they had been publicly exposed, which was laid upon the table in J. B. Smith's office; and that while Smith was gone for the warrant, and the lady went over to the house, Mr. J. B. Smith drew the load, and put the pistol away. When the lady came out the second time, she met at the door Mr. Abbot (Carson's friend,) who also went to Mr. J. B. Smith's office.—They continued some considerable time at J. B. Smith's office. Smith showing great reluctance to going home while Carson was there. He sent J. B. Smith's servant over twice to see if he was gone. Such conduct negatives all idea of premeditation.—At length, it growing too late to stay any longer at Mr. J. B. Smith's office, and having no other place to have recourse to, he was reluctantly prevailed on to return home.—They went up stairs, the lady went into the parlour, while Smith, justly apprehending his life to be in imminent danger, went up to his bed-chamber, and got the other pistol for defence.—When he entered the room, he found there Mr. Carson, Mr. and Mrs. Baker, (the latter his deadly enemy,) Mr. Abbot, (the friend of Carson,) and the lady. He took off his hat and laid it down, and had taken a few steps within his own parlour; Mrs. Baker called him a wretch and adulterer, upon which Carson rose, and in an angry and determined tone, ordered Smith out of his own house. Such conduct would have been highly illegal and improper in any place, towards any person and under any circumstances; but when it is considered that it was in the very place where he had a few days before attempted the life of Smith, and that he was then under a recognizance to keep the peace towards that very person, and particularly in that very house, his conduct shows an utter contempt for the law, a determined resolution to revenge himself upon the person of Smith at all hazards.—But to return to the interesting crisis in which we left the parties.—Carson advanced upon Smith; Smith retired from Carson. Who then was the aggressor? Smith, whom the charge supposes to have made the attack, retired to the utmost extremity of the room, and Carson, who it is pretended was the attacked, follows him to that extreme corner. In the meantime, Mr. Baker, a very powerful man, and Mrs. Baker, a very resolute and determined woman, both of whom came there for the very purpose of assisting Carson in his illegal and forcible entry into, and detainer of the house, rise and follow Carson; not to prevent his attack on Smith, but to place themselves in positions that would effectually cut off Smith's retreat to the door. Even Mr. Abbot, who had heard the lady tell Smith he knew where there was another pistol, and who saw from the position of his hand, when he passed him at the door, does not act, utters not a word to prevent the impending mischief.—Smith had, therefore, only a choice of evils; to be killed, or to defend his life by repelling force to force.—As to the pacific expressions of Carson, they cannot alter the case, for they were at variance with his actions, and therefore insincere. He was speaking the language of peace, but he was advancing with all the attitudes of war. "His tongue dropt manna, but his heart was false and hollow."—Nor was open force the only thing with which Smith had to contend, but secret art and guile. On the former occasion, when he apprehended that Smith was armed, what was his behaviour? He made slow and peaceful advances, and having, under colour of a flag, ascertained that his opponent was unarmed and unprepared, he seizes his weapons, and makes a sudden onset. Then he only *suspected*, now he must have *known* that Smith was armed. He had been informed so by Mrs. Baker, and from the position of his right hand, he must have known that the information was correct. He therefore counterfeits the same pacific intentions, with the same illegal and malicious motives and intentions. When, therefore, he said his *hands* were *tied*, he was desirous, a second time, to lull Smith into security, that he might approach near enough to seize him with his powerful arm, when Smith's life would inevitably have been the forfeit. He possessed personal strength vastly superior to Smith, and was of a violent temper. His words and actions, when taken altogether, will admit of no other construction, for he declared and repeated, that out of the house Smith should go, and there

were but two ways of putting him out of the house—one by the legal authority of the county, which he had contemned, and did not deign to call to his aid; and the other by the power of his own arm, which he falsely asserted he was exerting by the advice of his counsel. His election being made, he followed up his declarations with a violent blow upon Smith's nose, which but for his situation would have knocked him down, and it was not until all hopes of saving his life by any other means was entirely lost, that Smith resorted to the right of self-protection, and the act was therefore clearly done *se defendendo*. He places his defence, therefore, as will be perceived, upon that law which is implanted in our nature, *unalterable and eternal*. To impair or abolish which, or even to restrain its operations, is an attempt wicked and vain. Neither by the legislature nor the people can its powerful obligations be dissolved. Nor judge nor jury can abrogate or annul its provisions. It is not the law of man, but of nature. It requires no commentator; it needs no interpreter; for Almighty God, in his infinite goodness, has stamped it on the living tablets of our hearts.

The Rev. John W. Doak, sworn.—

Browne. Have the goodness to state whether you performed the marriage ceremony between Mr. Smith and Mrs. Smith? Witness. I did perform the marriage ceremony between the prisoner at the bar, and a lady who was called Mrs. Carson. I do not recollect the time, but it was, I believe, in October last. Judge Rush. Where were they married? A. In Frankford, at the tavern of Mr. Haines, on Sunday afternoon. I proposed giving a certificate. Mr. Smith declined accepting it. I a few days afterwards gave a certificate to a lady calling herself the mother of Mrs. Carson. Q. What was the date of that certificate? A. I cannot recollect.

Jonathan B. Smith, Esq. sworn.

Q. When did you become acquainted with Mr. Smith? A. In the spring of 1815; about at the time of the disbanding of the army I became acquainted with him. I was frequently in the habit of seeing Richard Smith. I had frequently given him advice concerning trifling affairs. Some time previous to this unfortunate affair, I observed him considerably agitated in mind; he told me on one occasion, there was something he wished to explain to me, but would not do it at that time: considering it indelicate to investigate anything relative to his family concerns, I forebore from asking him. This is the only circumstance worth mentioning—previous to his coming to my office, the evening Mr. Browne referred to. It was three or four days, I cannot recollect precisely the day, before the 20th of January, that Richard Smith came to my office in the afternoon greatly agitated, with his hat off, and his clothes very much dishevelled, and he, under so extreme perturbation, that he could not tell me what was the matter or why he came. Application was made by my advice to Judge Badger, to bind over Captain Carson for good behaviour and to keep the peace. Q. Did you attend the examination? A. I did. Q. Were they both there? A. Yes, sir. Q. Was it the same afternoon the application was made? A. I think it was, sir. Q. Was the warrant obtained that same afternoon? A. It was, sir. Q. Did the hearing take place that day, sir? A. I believe two days elapsed before the hearing took place. Q. State the nature of the complaint. A. Richard Smith, complained that Captain Carson had on the day to which I referred, sat with him at dinner, and they had dined together. They were sitting after dinner conversing upon their particular subject, in an amicable manner, and drinking brandy and water together. As they were doing this, immediately and suddenly, Captain Carson turned to him, and said, "I understand you go armed for me."—Smith replied, "I do not," using some stronger asseveration which I forget. Captain Carson immediately after took up a knife from the dining table at which they were sitting, and made a lunge at Smith's breast; Smith seized the arm and held it. Captain Carson took with the other arm and grasped another knife. Smith then began his retreat, and in the moment of his retreat, Captain Carson made another attempt to strike the knife into him; and at this moment Mrs. Smith threw herself between them, though I must explain to the court and jury, I am doubtful whether I received that idea from the examination before Judge Badger, or from her own representation. Richard Smith fled—Carson pursued him—and Smith came to my office; from there we went to Judge Badger's, and took out the writ. Smith was examined on oath, and disclosed all that I have repeated. Carson denied at first, but afterwards admitted that he had attacked him with a knife. Mr. Badger bound him over in 500 dollars—Mr. Hutton was his security. Q. Do you recollect any reflections on the courage of Mr. Smith? A. I recollect one. Richard Smith stated that he had fled from Captain Carson, and Captain Carson used this expression, which I recollect perfectly well: "He fled behind my wife's petticoats like a coward." Q. Did Captain Carson upon that occasion express any contempt of Mr. Smith? A. I do not recollect further than that expression. Q. Did he not intimate that he had challenged Captain Smith, and he would not fight him? A. No, sir, I do not recollect that he did. Mr. Smith stated before Captain Carson during the altercation, (there was a good deal of altercation between them,) that Carson had challenged him. There was a great deal of

conversation, a little violent, but there was nothing that I recollect. Richard Smith, instead of demanding money security from Captain Carson, told him that if he would give him his word and honour not to molest him until the affair was settled, he would not bind over. Judge Badger and myself both thought he ought to be bound over, although we agreed that Mr. Hutton should be admitted as security. Q. Was there not grease on Smith's coat when he came to your office? A. Yes, sir, there was grease; it appeared to be newly done, and such as would be done from such a cause. He appeared to be in great agitation—the marks of grease were on his breast. On the evening of the 20th, I had been out all the evening; about half after nine I returned home; there was a gentleman with me. We were sitting in my office—I suppose we might have sat ten or fifteen minutes—when Richard Smith came to the door. I forget whether he knocked or not; however he opened it, but refused to come in. I asked him the usual questions, what was the matter? His answer was that he and his wife had been turned out of doors, and that she was then at the front door. This conversation took place, may be, eight or nine feet from the office door. I went to the door and found Mrs. Smith there; she confirmed what her husband had said, and requested that I would let them stay in my office a little while. They added that they had been walking about a good while—it was a very cold night, that they were very cold, and had no fire to go to. Mr. Smith gave as a reason for not coming into the office, that there was a gentleman there, and his wife did not wish to see any. I accordingly took the gentleman up stairs, and left my office in the possession of Lieutenant Smith and his wife. They remained there, I suppose, twenty minutes or half an hour. By this time, the gentleman who was with me thought it time to go home, and he left me. I went into the office to see what was the matter with Mr. Smith and his wife. From this time until they went, I remained in the office with them; they explained to me the conduct of Captain Carson. I advised Richard Smith to go immediately for a warrant to Judge Badger. Richard Smith went out according to my advice; he returned after a lapse of fifteen or twenty minutes, and told me that he had been to Judge Badger's. Q. Where was Mrs. Smith? A. She had gone home. He told me he had been to Judge Badger's; that he was out—he had been to Bartram's, and he was out—he went to all the other magistrates he could think of, and could find none of them. I expressed my regret that he had been unsuccessful, and he not only appeared to regret it, but to be afflicted at it. Q. What was the expression of his countenance? A. I am no physiognomist, but my impression was, that it was an expression of very deep regret, almost amounting to despair. I was still inculcating upon him the necessity of taking further steps to procure a magistrate. I did not recollect myself to tell him to go to the watch. When they first came, after I had gone into the office a second time, I think it was, I observed they had brought a pistol with them; which of them brought it I cannot say. This pistol remained on the table; and when Richard Smith went for the magistrate, and when he went home, I took the opportunity of drawing the load and putting away the pistol. *Judge Rush.* Was it your pistol? A. Yes, sir, it was my pistol. Q. What time was it you loaned the pistol? A. When Captain Carson had, I understood, made the attack upon Lieutenant Smith, and after we had applied to bind over Captain Carson, the constable who had the warrant, (Mr. Hoops,) came to me and requested permission, not to take the body of Captain Carson, but appoint an hour when we should all meet at Judge Badger's. This was in the afternoon; but in the course of the evening I saw Richard Smith and Mrs. Smith; they both expressed such a fear of being intruded upon in the night, that I thought it was right and proper Richard Smith should have some arms to protect him from any attack that might happen. He asked me for the pistols. I frequently refused, but his wife's fears appearing as great as his were, I lent them—they were loaded in my office. At the time I lent him the pistol, I represented to him the proper use which was to be made of them, and told him only to use them in defence of his own life, or in defence of his wife's honour. He promised to me that he would make that use and no other of them—that is the history of the lending. It was the evening of the same day on which Captain Carson attempted to take Richard Smith's life. After Richard Smith and Mrs. Smith left my office I remained there for some time. In about a quarter of an hour I heard an outcry in the street. The windows of some of the opposite houses were thrown open, and people inquiring and running down the street. I ran down and found Richard Smith. I believe he was seized and surrounded by three or four people; Captain Baker was near him—it was dark; I did not expect to find Smith there, and I was much astonished to find that he was surrounded in that way. I found him much disordered; his face was bloody. Q. Was there a lamp? A. There was a lamp, sir; I believe that was the only mark of violence. I soon found that the people were attempting to treat him very harshly, and I presuming upon the influence I supposed myself to have over him, demanded that they should not injure him, but leave me to assist in taking him to the watch. There were many remarks made which I did not pay attention to, and do not recollect. He was finally put into the hands of some person, who treated him as he ought to have been treated, and he was conducted to the watch. When we got to the watch-house, corner of Market and Second, after I had delivered him into the hands of the watch,

and his face was washed, I observed a contusion on his nose; the blood, however, did not proceed from it; but from his nose or his mouth. Q. You say you knew him in 1815; did he bear a respectable character? A. He bore as respectable a character as young men of his age generally do. One of the jurymen wished to know if he had heard correctly, that he understood that Richard Smith, when attacked by Captain Carson, had seized his arm and held it? A. Yes, sir.

Mrs. Baker again called.—

Browne. I wish you to state to the court and jury whether Captain Carson did not insist upon staying and sleeping with Mrs. Smith? A. She told me so, sir, and I heard her say to him she could not nor would not that night. Att. Gen. You mentioned something of intemperance; I wish to know to what time of his life you referred? A. Before he went away. Q. How since his return? A. I have seen him twice a little gay. Q. How was he at the time of his marriage? A. I have seen him intoxicated before his marriage, and Captain Baker also, but I did not suppose he was habituated to it.

Sarah White sworn.—

Q. Did you live in the house with Mrs. Carson and afterwards with Mrs. Smith? A. Yes, sir. Q. How long did you live there? A. Nearly three years. Q. Did you live there on the 20th of January last? A. Yes, sir. Q. Did you live there when Mr. Smith married Mrs. Carson? A. Yes, sir. Q. Did you see the interview between him and Mrs. Baker? A. No, sir. Q. Did you see him and Mrs. Baker after they had come home? A. Yes, sir. Q. Did she receive him with kindness? A. Yes, sir. Q. And acknowledge him to be her son? A. Yes, sir. About three o'clock in the afternoon on Wednesday, I was sitting in the store, and I heard a very loud noise above; it was a short time after when Captain Smith came down stairs without his hat; presently Mrs. Carson said, "Richard, fly." Q. Where did her voice come from? A. From the stairs. I then made answer, he was gone; in the space of two or three minutes after, Captain Carson came down with two knives in his hand, appearing to be in a violent passion, exclaimed, "Where is the son of a bitch?" I then made answer, I know not. Q. Where did Captain Carson then go? A. He then went up stairs again. Q. Did you go up? A. No, sir, I remained down. Q. Did you hear anything after he went up? A. No, sir; nothing after he went up. Q. Were you at home when Richard Smith went out on the night of the 20th? A. I do not recollect whether or not. Q. Try to recollect if you did not let him out. A. Oh! yes, sir, I did see him go out. Q. Did he take any arms or weapons with him? A. No, sir.

Mr. Browne here read the 4th section of the Act of the Legislature, passed the 19th September, 1785, concerning divorces and alimony.

"SEC. 4. *And be it further enacted by the authority aforesaid, That if any husband or wife, upon any false rumour, in appearance well founded, of the death of the other, (where such other has been absent for the space of two whole years,) hath married, or shall marry again, he or she shall not be liable to the pains of adultery; but it shall be in the election of the party remaining unmarried, at his or her return, to insist to have his or her former wife or husband restored, or to have his or her own marriage dissolved, and the other party to remain with the second husband or wife; and in any suit or action instituted for this purpose, within one year after such return, the court may and shall sentence and decree accordingly.*"

Mr. Browne also read the petition for the divorce, dated the 15th January, 1816; the order to issue it was written the 18th January, 1816, and libel filed the 18th January, 1816. The subpoena was also read.

Dr. Gallagher sworn.—

Q. Do you know Captain Baker? A. Yes, sir. Q. Does he labour under any mental derangement? A. I believe it has been fifteen years since I attended the family; it was in the year 1801. I had not recollected that I had ever attended Captain Baker himself; but upon referring to my books, I found there was a consultation with Dr. Physick. I do not remember the case, nor have I put it down; I know about that time Captain Baker was deranged, but whether we attended him for that complaint, I cannot recollect. I have thought very much about it, but it is so many years ago, I cannot recollect. I have seen him subsequently, which impressed me with the fact, that he was in that state. I have seen him frequently since, but not as a physician.

Browne. As a further proof that Ann Carson was a *feme sole* trader, I produce a license from the United States to sell. Mr. Coxe, be so good as to state if that certificate was given by you. Mr. Coxe. Yes, sir; this was a license from the United States. Mr. B. read the license.—The court adjourned.

SATURDAY, 25th MAY, 8 O'CLOCK.—*Mrs. De Gorgue called.—*

Att. Gen. On the part of the prisoner a marriage has been given in evidence, which was solemnized in October, 1815. The act of Assembly has been read, which excuses in certain cases the parties from the pains of adultery, and the husband has his elec-

tion. I call this lady, to inquire whether she knows of an agreement which took place in January last.

Mr. Rawle. Although as yet we have had little success in opposing evidence altogether improper, yet, we think it our duty to oppose testimony which in our opinion ought not to be admitted. When we had gone through the testimony on the part of the prisoner, we did not contemplate an objection to this lady's testimony being admitted as to respect of time; but now it is clear, the case shows this lady's testimony is not admissible. We have it in evidence, that when Captain Carson made unexpectedly his appearance in Philadelphia, he was apprized in due time of his wife's second marriage; and he also, in due time, and after full opportunity of deliberation, determined to confirm that marriage, and seek relief from the marriage he had contracted, which he had now an opportunity of doing. On the 15th January he made his election decidedly; he confirmed the rights of Richard Smith, and completely destroyed his own. It was no longer in his power to impair the nuptial rights thus confirmed in Richard Smith. Under these circumstances, an agreement made between Ann Smith and John Carson, is not binding upon, and cannot affect the rights of Richard Smith; and now is it to come forward, and must it be admitted, not only to affect his property, but his life?—clearly not—I therefore contend that this evidence is not admissible. The prisoner at the bar was not a party, and could not be bound by any agreement entered into by his wife, to his prejudice. We conceive the act done by Carson in filing the affidavit, and applying for a divorce, was effectually binding upon him, and we therefore object to this evidence being admitted.

Att. Gen. I do not understand my friend, Mr. Rawle, when he says they have not been successful in opposing testimony. If the evidence had been according to law, no doubt it would have been admitted by the court. I stated that an agreement, not a mere conversation, was effected between Captain Carson and Mrs. Smith, to live together as man and wife; under the act of Assembly this was enough. As to the pretended marriage between Mrs. Carson and Richard Smith, I shall contend, and I trust will prove, concerning this marriage no evidence has been given, but the loose testimony of Mrs. Baker. But, I would ask, have I not a right to prove facts that bring the question before the court? Whether the court will decide for me or against me, upon these facts, must be tried. On the 15th an application was made by Captain Carson for a divorce; it was a matter merely inchoate; how it would terminate was uncertain; but the party applying for the divorce, may waive that application when he pleases; although he begins, he is not forced to proceed to a conclusion. On the 17th, this agreement was made, and on the 18th it was coincided in by Smith himself; for, there is a note from Richard Smith to Mrs. Carson, drawn in her favour, in which he says he is going to a distant part of the United States. Here, then, are all concurring in the restitution of Ann Carson to her husband. I am not going to anticipate; but I have a right to state these facts, and then refer to your honours, whether this is not allowed by the act of Assembly. This is a law of latitudinarian effect; and therefore it ought, when it comes under the cognizance of the court, to receive a rather strict interpretation. All I shall now say upon this subject is, that I think it proper the witness should state these facts, which are accompanied by a letter on the 18th, from Richard Smith, to show they all acquiesced in the plan of Mrs. Carson's living with her husband.

Rawle. I shall say one word in reply. That we have been generally unsuccessful in opposing testimony, the court very well know. The observation of Mr. Ingersoll, was to imply, I presume, that we have taken wrong grounds before the court; I merely introduced the observation, in my objection to this testimony, to evince to the court, that we were not discouraged from doing what we considered our duty, by repeated disappointment. One of my learned friend's positions is certainly untenable, and altogether inadmissible. He asks "Whether he has not a right to prove the facts, and to take the determination of the court?" if this be so, the court has nothing to do but take all the testimony that is offered, and afterwards decide whether it was or was not proper to have been adduced. This is not the general practice of our courts. The court must anticipate the result of such a practice, and I trust, will not conform to it. Am I not correct in saying, that when John Carson made his election, his rights were concluded on the one side, and the rights of Richard Smith completely established and confirmed? Mr. Ingersoll says a person may draw up a petition for a divorce, but may retire from its prosecution at any time before the decree of the court: this I grant may be generally correct, but when we find it on other grounds, when Captain Carson makes such election by filing a petition for a divorce, which sets forth the subsequent marriage, does it not at once place the case on a different footing? does it not state facts, not necessary to be introduced unless to establish the right of the succeeding husband? Under these circumstances the election of Captain Carson was complete, and excluded him from any other marital rights. Mr. Carson had no right to enter into any conversation with the wife of another in his absence that could divest the property; nor could

it affect the life of the other person; let that letter stand on its own ground; when we come to observe upon it to the jury, it will afford sufficient argument. That letter offers to our view a willingness in Richard Smith to separate himself from a wife tenderly loved, but far from acknowledging his marriage to be invalid; he considers himself and signed it as her husband; and in that letter there is no reference to this agreement to which he was a stranger, and therefore it could not bind him; we do not wish to impress anything upon the minds of the jury which is not completely relevant and consistent to established rules of evidence.

Judge Rush. It appears to the court the evidence is clearly admissible. In the course of this cause a collateral issue has arisen, brought into our view as evidence by the prisoner himself. This issue is, whether the woman was the wife of the prisoner or John Carson. When this is brought into the presence of the court and jury, it would be wrong to exclude any evidence that would throw any light upon it. We are therefore of opinion, since it has been introduced, the evidence ought to be heard on both sides. We think clearly, the evidence ought to be admitted.

Quest. Have you heard any agreement made between Captain Carson and his wife? A. I can't clearly recollect the circumstance; I put it in writing, and gave it to Mr. Hutton. On the Wednesday evening prior to this accident, Captain Carson and Mrs. Carson came to my house. I was called down stairs. I was told a gentleman and lady wished to see me. I desired they should walk into the parlour. No conversation ever took place, only that which was relative to the business. When I came down Captain Carson and Mrs. Carson were in the room. I was not on habits of intimacy with them nor in the habit of seeing them.—Mrs. Carson observed to me, turning round, "This is Captain Carson, my husband." I turned then, and asked in these words, or tantamount to them, and asked what they wanted with me; they both exclaimed as with one voice, that they were too unfortunate and came to me to get some advice, or my assistance, as they wished again to live together; then they said they had come to an agreement to live together. Captain Carson wanted to know what would be the consequence of the proceeding for a divorce. I said, I was incapable of informing them on that subject. Mrs. Carson then requested Captain Carson to show the paper; he took it out of his pocket, and she read it; this was the notice about the divorce. I told them I did not know the nature of those things; but I supposed where there is no prosecutor there is no defendant, and that he had better apply to his lawyer. Then they departed, having agreed that they were to live together again. I told him, he had acted highly culpable; he acknowledged he had been so. I represented to him this as forcibly as I well could; he was, I told him, the natural protector of his wife and children, and that he had deserted them. He acknowledged he had; he said that he had left his wife and children unprotected, and surely, as an apology, I can't do otherwise than love this woman who has acted in such a way with my children. He said, he had left his children to the world; he could not help but love the wife who had been such a protector for his children. He then told me, that in all the time he was gone, he had never written to his wife, nor given her any intimation he was in existence. Captain Carson then asked my advice, respecting the situation they should place themselves in; as they thought it was highly improper for them to remain in Philadelphia. Captain Carson made a great many observations respecting the respectability of his children. Mrs. Carson said that they had never lived very happily together; Captain Carson was of a very violent temper, and she was of a high spirit; it was not for want of affection, but because of the disagreement of dispositions. They then agreed perfectly to quit Philadelphia together. Captain Carson was to get a ship for Liverpool; I understood, that he had the offer of one, and he was to take his wife and family with him to Liverpool. Captain Carson spoke of realizing some property and of turning it into cash, to the amount of about 15,000 dollars, the papers of which were in the possession of Mrs. Carson. They appeared perfectly agreed on the subject; the money was to be taken with him and be laid out in her way, in ware; they were then to return to America together; they were to live together, and Mrs. Carson exacted from Captain Carson, that he would never again leave her. Mrs. Carson observed to him, "I cannot think myself protected without you, and my children will have no protector." Captain Carson then represented to Mrs. Carson that his element was the sea; that he could do nothing on shore; she told him, "It would take very little time to instruct him in that business, and he would make more in one day than a month's wages." He acquiesced in her wishes, apparently, and finally promised he would never quit her again; that he would remain with her and protect her and her children. Att. Gen. You mentioned yesterday a letter which had been written by the prisoner. Wit. Yes, it was a paper written by Mr. Smith: it was in the shop of Mrs. Carson, prior to this conversation. On Wednesday I had a visit from Mrs. Carson to make this inquiry; whether I would have time to come there—whether I would take an interest in their affairs. The paper was delivered on Thursday before me; the conversation I have been relating took place on Friday evening, the evening succeeding. Here is a note I received from Mrs. Carson

on Thursday morning; it accounts, in some respects, for my having seen Mrs. Carson.—Att. Gen. It is not evidence certainly, (*having looked at it.*) Q. Was there any time mentioned when Captain Carson was to come to the house? A. I believe he was to come on Monday next. It was my impression it was to be on Monday following; it was not actually stated; but it was my supposition from what had been said and subsequent circumstances. Mr. Carson came to my house on Saturday night, and said he was going there that night; I observed to him, “Why Captain Carson, I thought you were not to go until Monday,” and advised him very much against it.

Mrs. De Gorgue's evidence closed the testimony.

TUESDAY, 28th MAY, P. M.—JUDGE RUSH charged the jury in the following manner: *Gentlemen of the Jury* :—

I request your attention to what I am about to say to you, and I also request that you would consider this charge as proceeding from the whole court.—The prisoner in the bar, Richard Smith, is indicted for the murder of John Carson by shooting him through the head, on the 20th of January last. There is not the least doubt he died of the wound, after languishing till the 4th of February. It is your duty, to decide, by your verdict, taking into consideration all the circumstances of the case, whether he be guilty of murder or not. A jury has a right, in criminal cases, to give a special, or a general verdict. A special verdict states all the material facts, and submits to the court the question of law arising on these facts. This is not usual, and is not expected by this court. A general verdict is where the jury, in general terms, say the prisoner is guilty or not guilty. From the right which a jury has, to give a general verdict in all criminal cases, it follows they have incidentally a right to determine both the law and the facts, which are often almost inseparably connected with each other. What says the Constitution upon this point? In indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases. From the evidence it appears, that John Carson the deceased, was married to Ann Baker, in June, 1801, and that she was afterwards married in the month of October, 1815, to Richard Smith the prisoner in the bar. It is made a question whose wife she was on the 20th of last January, the day on which Carson fell, by the hands of Smith. It is provided by our Divorce Law, where a man leaves his family for two years, and his wife marries after that time, in consequence of a report, apparently well grounded, that her husband is dead, that in such case she is not guilty of adultery—and that the husband, on his return, may insist upon having his wife back again, or to be divorced from her—and that he may institute a suit for a divorce within six months after his return. To make the marriage of a wife lawful, in any degree, under this act, two things are expressly required by the very words of it. 1st. That the husband has been two years absent. 2d. That a rumour existed of the death of the husband. The marriage must be founded on both circumstances to give it validity. What is the evidence in this case? There is no doubt that Captain Carson had been absent two years at the time his wife was married to the prisoner. But the other circumstance, viz. the report, or rumour of the death of Captain Carson, has not been made out in proof. To justify the second marriage of Mrs. Carson, there should be evidence of a rumour of this description. What is the meaning of the expression—“a rumour of the death of a man, in appearance well founded?” We think it means general report, that a man died at a particular town or place, was shipwrecked, or lost his life in some way, which the report specifies. It appears to the court that the expression “in appearance well founded,” has reference to the place and manner of his death. No such evidence has been given. Jane Baker only says, “There was a rumour of Carson's death; a sailor said so.” This loose evidence is not the evidence the law requires, to justify a wife's marrying in the absence of her husband. There must be a general report of his death, and of the place and manner of it. There not being the evidence required by law, to authorize the marriage of Ann Carson with the prisoner in the bar, it is clearly the opinion of the court, it was to all intents and purposes null and void. This being the case, it follows, that she was guilty of adultery with Smith, that the rights of Smith as a third person, have no legal foundation or existence, that Carson had an undoubted right to proceed at law against his wife for a divorce, and to settle with her, and withdraw the suit, whenever he thought proper, without the consent of the prisoner, or any other person. The law now under consideration supposes a case of this very kind, by enacting, that in any suit for a divorce on the ground of adultery, if the defendant shall prove that the plaintiff admitted the defendant into conjugal embraces, after he knew she had been guilty of adultery, it shall operate as a perpetual bar to his obtaining a divorce. We go further and state to you upon this point, that Ann Carson could not have two husbands at the same time. She could not be at the same time the wife of John Carson and of the prisoner. She was unquestionably once the wife of John Carson, and nothing but death or divorce could dissolve the connexion. These are the only two modes known to the law, of terminating the marriage contract. It is stated by the defendant's counsel, that a subpoena for the purpose of obtaining a divorce, is so decisive of the intent of the party, that

he cannot alter or change his intention. This is strange language, and is equivalent to saying, the bringing a suit for divorce, and the decree in the case are equally binding on the party. Where would be the use of the decree, if the subpoena was conclusive in the libellant? We are therefore clearly of opinion that on the 20th of January last, Ann Carson was the wife of John Carson, and that he had a right to settle his differences with his wife, and to receive her again into his arms. It being universally understood and known that the property of the wife is the property of the husband, and that he alone has the control over it, the consequence is, that John Carson had an undoubted right to take possession of the house and goods which belonged to his wife, on his return in January last, to this city and to his family. It follows that Richard Smith, the prisoner, was an intruder, and had acquired unlawful possession of the wife, of the house, and of the goods and chattels of John Carson. This point being settled, we proceed to remark, that the crime of murder essentially consists, in taking away the life of a fellow creature, with circumstances that show a vindictive temper and malignity of heart. It is not the design of the court to distract your minds, or fatigue your attention, by a tedious discussion on the law of murder. We shall endeavour to make you understand so much of this subject, that you may be able to form a correct judgment on the question submitted to you. It will be proper to state a few leading principles, that have received the sanction of the highest judicial authority, in this state, subsequent to passing the law of 1794. In the case of the Commonwealth vs. Mulatto Bob, tried at Easton in 1795, before Chief Justice M'Kean and Judge Smith, it was decided by the court, that since passing the law of 1794, the intention still remains the criterion of the crime—that the intention of the prisoner, is to be collected from his words and actions, and that on the supposition, a man, without uttering a word, should strike another on the head, with an axe, it would be deemed premeditated violence. In the case of the Commonwealth vs. O'Hara, tried before Chief Justice M'Kean and Judges Shippen, and Smith, in Philadelphia, in the year 1797, the court held, if the murder be committed with an instrument, likely to kill, it is wilful; and that to make it deliberate and premeditated the party must have time to reflect and to frame the design, however short the time may be, and *must* intend to kill. If the defendant has time to think, and did intend to kill for a minute as well as an hour, or a day, it is a deliberate, wilful, and premeditated killing, constituting murder in the first degree within the act of assembly. We shall presently examine the conduct of the prisoner, and compare it, with the principles laid down in these cases. In the meantime, we observe to you, gentlemen, that the principles just stated, are from the highest judicial authority in Pennsylvania, and that it is the duty of this court, and of you as jurymen, to submit to them. For a moment however, gentlemen, let us inquire into their correctness. The wilful, deliberate, and premeditated killing a person, is by the law of 1794, described to be murder in the first degree. What is it to kill a person wilfully? It is the same thing as killing him on purpose. He who does an act wilfully, does it on purpose, and he who does an act on purpose, does it wilfully. The next ingredient to make the killing murder in the first degree, is, it must be deliberate. But does the law fix the time of such deliberation—no such thing, gentlemen—does it say that the prisoner must ponder over the crime for years, for months, for weeks, or days, or hours, or for any other given time? What sort of a law would it be, if such construction were put upon it, by courts and juries? Suppose, for example, it should be contended, that it must appear the party had pondered on the commission of the crime one hour or five minutes before the fact. I ask then, why fix an hour or five minutes, for deliberation? why not half an hour? why not two hours? why not two minutes? The truth is, in the nature of the thing, no time is fixed by the law, or can be fixed for the deliberation required, to constitute the crime of murder. To deliberate is to reflect, with a view to make a choice, and if it appeared the party did reflect, though but for a minute before he acted, it is unquestionably a sufficient deliberation, within the meaning of the act of assembly. The last requisite to constitute murder in the first degree, is that the killing must be premeditated. To premeditate is to think of a matter before hand, it is to conceive of a thing before it is executed. The word premeditated would seem to imply, something more than deliberate, and may mean, that the party had not only deliberated, but had framed in his mind the plan of destruction. We therefore say to you, gentlemen, and we say it confidently, that it is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind a scheme of murder, and to contrive the means of accomplishing it. Gentlemen—It is well known that certain acts will so far justify a man, that his killing another will not be murder. There are also other acts that are not a sufficient provocation to justify killing a person. For example, the demand of a debt is not a provocation to justify killing. It is therefore murder, to kill a man in the act of asking the payment of a debt. Further, gentlemen, it is a principle of law, that no breach of a man's word or promise—no trespass either to lands or goods, no affront by word or gesture, will excuse a person from the crime of murder, if he becomes so far transported as to kill the person who then offends him. Apply this to

the facts before you.—Suppose then the house was in fact Smith's, and that Carson, in going there on Saturday to demand the possession of his family, was a trespasser, it is the opinion of the court, that Smith's killing him, under these circumstances, in the very act of making such peaceable demand is, in every principle of law, murder in the first degree. To recapitulate all the testimony that has been laid before you, would be an endless task, and I add, a useless task; because on this trial, as on all others, a great deal of evidence has been given, that has no more bearing on the merits of the case than one of *Æsop's Fables*, or a chapter from *Don Quixote*. Evidence of this description it is not our practice to take down in writing. The material facts in this cause seem to be these: On the 20th of January last, at about 11 o'clock at night, the prisoner in the bar shot John Carson through the head, of which wound he died on the 4th of the next month. That on Wednesday the 17th of January, the prisoner and the deceased dined together at the house of John Carson, at the corner of Second and Dock streets—on this occasion John Carson got into a rage, at seeing the prisoner assume the direction of his children, and his servants, and seizing a knife, made an attempt to strike him; the prisoner laid hold of his arm, on which the deceased with the other arm, took up another knife—Mrs. Carson attempted to hold her husband, but breaking loose, he ran down stairs, with two knives in his hands, in pursuit of Smith, who had gone off without his hat. Upon Mrs. Carson telling her husband, if he wanted to commit murder, to murder her, he exclaimed, "Murder—yes!" The evening of this very day, the prisoner was seen in the kitchen with a pair of pistols, one of which was loaded, that he then declared "That if Carson entered the door, to lay hands on him, he would certainly shoot him." In consequence of this violence of John Carson, he was on the application of the prisoner bound over the next day to keep the peace. The next interview between the prisoner and the deceased was on Saturday evening, which terminated the mortal career of John Carson, in the manner you have heard. On this fatal evening, Captain Carson came to his house between 7 and 8 o'clock, when Mrs. Carson and Smith both left it. Carson then sent for Thomas Baker and Jane Baker, the parents of Mrs. Carson, who about 10 o'clock went to the house. On coming there, they found Carson in the china-store—he and they went up stairs into the parlour. Between 10 and 11 that evening, Thomas Abbot went home, and being informed that Mr. and Mrs. Baker, who lived under his roof, had gone to Mrs. Carson's, he determined to follow them there. When he got near the house, he saw Mrs. Carson, and went with her into the office of Jonathan B. Smith, in the neighbourhood of Carson's house. The prisoner came in soon after, and asked Jonathan Smith to give him the pistol, which was refused. Mrs. Carson then said, "Let us go—you know where there is one." The prisoner swore, if Carson attempted to touch him, he would kill him. The prisoner, Mrs. Carson, and Thomas Abbot, left the office of J. B. Smith together, and on coming to the house of Carson Abbot staid below, and Mrs. Carson and the prisoner went up stairs. In about a minute Abbot followed them up stairs, and passing the prisoner standing in the entry, with his right hand upon his breast, under his surtout coat, and his left hand also on his breast; he went into the parlour, where he found Captain Carson, Mrs. Carson, Thomas Baker, and Jane Baker. Abbot had not been in the room more than half a minute, when the prisoner came in, and stood near the door, in the same attitude in which he appeared in the entry; that is, he had his right hand under his surtout, buttoned on top and bottom, and his left hand on his breast, over his right hand. Captain Carson then got up, and told the prisoner he had come to take peaceable possession of his house, that out of the house he must go. The prisoner then said, "Very well," and turning to Mrs. Carson, said, "Ann, shall I go?" who replied, "No, stay." The prisoner then went to the north-east corner, and Carson followed him, told him again, and repeated it two or three times, he must leave the house—"My hands are tied—I have no weapon"—at this time, he held his hands down by his side, open—it might be seen he had nothing in his hands. Upon this, Smith drew a pistol from under his surtout coat, and shot Carson in the mouth, and throwing the pistol on the floor, ran down stairs as fast as he could; that Captain Baker pursued him, heard him tumble among the china, and overtook him on the step of the front door. Smith, the prisoner, when conveyed to jail, had his nose injured and bloody. The deceased declared in his last illness, "that the prisoner had come in like a midnight assassin, and had shot him like a coward." It was further in evidence, that Smith might have left the corner in the parlour without running against any body. From this evidence the question presented to you is, of what crime is the prisoner guilty. Murder in the first degree, is the wilful, deliberate and premeditated killing another. There are various inferior kinds of homicide. But on the present indictment, our attention is confined to the consideration of the highest and most aggravated description of the crime. Then let us ask, did the prisoner wilfully kill John Carson? It is not pretended there was any accident in the case. The killing, therefore, was wilful, and on purpose. Was it deliberate and premeditated? or was it the effect of a sudden passion, produced by a reasonable provocation? There is no evidence to show a sudden passion, or that the prisoner had that evening received any provo-

cation from the deceased. All the witnesses who were present agree, that Carson did not touch him, or lay the weight of his fingers upon him. The killing, therefore, was not the effect of a sudden passion.—But was it deliberate, gentlemen? Look at the prisoner standing in the entry, with the pistol buried under his surcoat, see him entering the parlour, in the same attitude, taking his stand, drawing the pistol, and coolly discharging it into the mouth of Carson, and ask yourselves whether this was not a *most* deliberate act.—Was the killing premeditated? On Wednesday night he had prepared himself with pistols, and declared, if ever Carson entered the door, to lay hands on him, he would certainly shoot him. On Saturday evening, he made a similar declaration. He did not however wait, until Carson touched him, but shot him, without receiving from him the least personal injury, or even threat. In the language of Chief Justice M'Kean, we add, that where a man, without uttering a word, strikes another on the head with an axe, it is an act of premeditated violence. What is the language of the court in the case of the *Commonwealth v. O'Hara*? If the prisoner have time to think and did intend to kill for a minute, it is wilful, deliberate and premeditated killing; as well as if he had intended to kill, for an hour or a day. With respect to the conduct of Carson at his own house on Wednesday, in drawing a knife on Smith, it was altogether unjustifiable. What would have been the consequence if he had killed him, we are not now called upon to decide. This we will say, that two wrongs cannot make a right—that Carson's violence on Wednesday, can never justify Smith in deliberately killing Carson on the Saturday following. Who is there among us that will justify assassination? Nobody, I trust.—But it will be quite as easy to justify assassination, on the principle of revenge, as the conduct of the prisoner, in deliberately shooting Carson through the head three days after Carson had injured him. Much has been said on the principle of self-defence, as applied to the prisoner, but with what propriety, we are at a loss to discover. Who laid hands on him? who attacked him? who threatened him? who touched him? He went voluntarily into the room, chose his situation, and fired when he pleased. He was not dragged into the room, and there detained against his will. On the contrary, he *only* was armed, and under restraint from no person. It has been said by one of the witnesses, that the pistols were procured for self-defence. If this was really the case, it is much to be lamented, they were employed to a most mischievous and deadly purpose. The dying declarations of John Carson are of weight in this cause, who averred, when he lost all hopes of living, "that the prisoner had come like an assassin, and shot him like a coward." This description of the offence of the prisoner accords very much with the representation of it given by the witnesses. The flight of the prisoner is always, in the eye of the law, evidence of guilt. Smith had no sooner discharged the fatal instrument, than it was dashed on the floor, and he fled from the room with the utmost speed. His fall among the china, the difficulty of getting through the street door, which opened inwardly, and his stumbling at the front door, were the providential circumstances that prevented his escape. The man who has committed no crime, in general faces his accusers, and boldly maintains his innocence. On the other hand, the guilty creature, who knows he has exposed himself to the just vengeance of the law, is uniformly seen to endeavour to avoid, by flight, that punishment which he is conscious he has merited at every earthly tribunal. A good deal has been said of the history of Captain Carson's life and character. Alas! gentlemen, it is the melancholy history of his *death*, you are called upon to hear and to decide. He had settled his difference with his wife on Friday: and anxious for a reunion had formed a plan of getting possession of his house on Saturday, the next day. He very naturally, therefore, sends for his wife's nearest connexions to be witnesses of his ordering the prisoner to quit his house. It is plain, they were not sent for to assist him to take possession by force, because they came without arms, and no force was used. But whatever was his motive, it was so ordered by Providence, that it was an invitation to his death and funeral. It is true, gentlemen, Smith did go on Saturday night, to look for a magistrate, to turn Carson out, as he expressed it.—Being disappointed, he resolved to take the law into his own hands, and deliberately procuring a pistol, went forward into the room, where he knew Carson was, and coolly discharged its contents into his head. Justice is certainly due to the prisoner in the bar—nobody doubts it. But is justice due to Richard Smith only? Is no justice due to the public?—Is no justice due to society? Is the life of a man of no value? Is no atonement to be made to offended law, for the shedding of innocent blood? Judge for yourselves, gentlemen. Punishment is not the province of a court and jury. Our rulers, the legislature of our country, have established a penal code, assigning to each crime its proper punishment. Upon this point, we have no right to reason—acquiescence is our duty. I will however observe, gentlemen, that the practice of all nations, civilized and barbarous, accords with the voice of religion, which is the voice of God: "Whoso sheddeth man's blood," that is, deliberately sheds it, "by man shall his blood be shed." What is the case before you in substance, and in a few words? It is this:—The prisoner having by colour and forms of laws acquired unlawful possession of the house of Carson, of his goods and chattels, of his wife and chil-

dren, deliberately shot him, afterwards, in his *own* house, in the very act of peaceably demanding restitution of all that was dear to him. It is a fine reflection of chief justice Hale, "Let me remember," says that great and good man, "when I find myself inclined to *pity* a criminal, that there is also a *pity* due to the people and to the country." The court have done their duty—it remains with you to do your duty. Remember, gentlemen, the vows of God are upon you; to decide according to law, and to evidence. We have stated both the law and the facts, and leave you to judge for yourselves—you have a right to determine *both*. If you believe the witnesses, who were present, and saw the crime committed, it is your duty to convict the prisoner of murder in the first degree—but if you do not believe the witnesses, it is your duty to acquit him.

SATURDAY, JUNE 1st, 7 o'clock, A. M.—Judge Rush proceeded to sentence the prisoner. Richard Smith, you have been convicted on full and satisfactory evidence, of the murder of John Carson, for which, by the law of the land, you must suffer death. What have you to say why sentence of death should not be passed upon you?

P. A. Browne, Esq.—*That the prisoner's objections, why sentence should not be passed upon him, may be better understood, his counsel have reduced them to writing.—Richard Smith being asked if he has anything to say why judgment should not be pronounced against him, answers, that his conviction is unjust and illegal.—His trial was hurried on in the absence of one of his witnesses, although he made the usual affidavit, and prayed a continuance.—His cause was tried before the prejudices, which had arisen against him, had had time to subside, and the public mind had graduated to that temperature which was necessary to insure him a fair trial.—The court rejected legal evidence which would have been favourable to him, (the prisoner).—After one of the witnesses for the prosecution had, in her cross-examination, and without objection on the part of the attorney-general, stated that the deceased had been at times subject to intemperance, he (the prisoner) was not allowed to give further evidence by Redwood Fisher of those habits of intemperance.—The court admitted illegal evidence unfavourable to him, (the prisoner).—Mrs. De Gorgue was admitted to give evidence of a conversation between herself, John Carson, and Ann Smith, formerly Ann Carson, at which he (Richard Smith) was not present; and of an agreement alleged to have been made between the said Ann Smith and John Carson, that the said John should resume his marital rights in respect to the said Ann, although a subpoena, under the divorce law, had been previously issued and served on the said Ann, whereby the election of the said John to be divorced from the bonds of matrimony with her, and thereby the subsequent marriage with him, (Richard Smith) was thus manifested.—The president formed his opinion, and wrote his charge, before he had heard his (the prisoner's) defence.—The president of the court erred in his charge to the jury.—The question, whether the marriage of him (the prisoner) with Ann Smith, the former wife of Carson, was legal, depended upon the facts, whether John Carson had been absent for two years, and whether previously to the marriage there existed a rumour, in appearance well founded, of the death of Carson.—The absence of Carson for two years and upwards was fully proved.—It was also fully proven, by the witnesses for the prosecution, that during his absence no intelligence from him, nor of his continuing in existence, had been received, and that there was a rumour of his death—a sailor had said so.—It thus became a mere question of fact, on which the jury alone were to decide, whether such a rumour existed, and whether it was in appearance well founded.—Yet the court laid it down to the jury, as the legal construction of the act of assembly, that no such rumour could be well founded unless it stated the place where, and the manner in which, the supposed death took place.—The court also erred in the charge, in not informing the jury that they had power, under the bill of indictment, to find him (the prisoner) guilty of murder in the second degree.—The court also erred, in not informing the jury, that if they doubted they should acquit him (the prisoner).—The court also erred, in endeavouring to throw ridicule on the evidence produced by him, (the prisoner) by comparing it to *Æsop's Fables*, and *Don Quixote*, instead of stating it to the jury for their deliberate consideration.—The court also erred, in refusing to inform one of the jurors, who asked the question, whether he could find him (the prisoner) guilty of murder in the second degree.*

Judge Rush.—The court think this is not a proper time to refute several things alleged in that paper. It is sufficient to say, they are not only false, but utterly without foundation.—[The judge then continued]—Previous to doing this, permit me to address a few words to you.—As your continuance in this world will be but for a short time, it becomes you seriously to reflect on the world of spirits, into which you will soon be launched. Dream not, I beseech you, of annihilation, or that death is an eternal sleep. The more you indulge in such unfounded speculations, the greater will be your disappointment and horror, when you awake in the eternal world.—You have received life, not upon your own terms, but upon the terms of Him who gave it. With the existence of every moral agent, God has seen fit, inseparably to connect, both immortality and responsibility.—It is not in your power, however it may consist both with your wishes and your interests, to cease to be, or to divest yourself of responsibility. God is repre-

sented in the Scriptures, as an infinitely wise and just Being—but we could scarcely conceive of Him in that character, if a wicked man, after committing innumerable crimes and murders, were permitted to escape punishment, by ceasing to exist.—It is, therefore, both wisdom and duty, to prepare for the change in your mode of existence, that is rapidly approaching.—Life and immortality are brought to light by the Gospel. In this precious volume only, is discovered a true account of the fall and depravity of man, and of his elevation to happiness through the atoning blood of the Son of God.—Here, and here alone, a soul, lost and bewildered in a maze of guilt, can find a clue to guide him to the Day-spring from on high—the Saviour of sinners.—The principal feature in this astonishing display of infinite wisdom and goodness, is, that it opens a door for the most abandoned sinners to return through the means of repentance. Murderers have been pardoned, therefore you may be pardoned in the case of your repentance, and washed from your sins in the blood of Jesus, that cleanseth from all sin. To this blood you must apply, if you wish to escape the regions of perpetual sorrow and despair.—Though it be true, the gospel has opened a door for a repenting and returning sinner, it is equally true, he has no *right* to expect to be pardoned unless he uses his best endeavours; which there is reason to believe God will bless with success, as they are the means appointed by himself. I therefore advise you to strive to enter in at the strait gate. Double diligence, nay, ten-fold diligence, is necessary in your alarming situation. You have but a short time to live, and a great work to accomplish in the space of a few weeks. It becomes you, therefore, to work out your salvation with fear and trembling, for it is God that works in you to will and to do of his own good pleasure.—You are a young man, cut off by vice in the morning of your days. Your sun has scarcely risen, before it will set—not, I hope, under shades of everlasting night, but that in the morning of the resurrection you may shine in robes of innocence, purchased by the blood of the Lamb.—Now to the grace, mercy, and goodness of God I commend you; and conclude with this single request, that immediately on your return to prison, you send for some pious divine, to pray with you and for you, and to assist you in preparing for the awful change that soon awaits you.—The sentence which the law prescribes for murder in the first degree, and the court awards, is this: “That you be taken from hence, to the jail of the city and county of Philadelphia, from whence you came, and from thence to the place of execution, and to be there hanged by the neck, until you are dead; and may God have mercy upon your soul.”

REPORT OF THE TRIAL OF T. O. SELFRIDGE, ESQ.¹

CONDENSED FROM PAMPHLET REPORT.

The Court was opened on Tuesday, the 25th day of November, 1805, present,²—The Hon. Theophilus Parsons, LL. D., Chief Justice; the Hon. Theodore Sedgwick, LL. D., the Hon. Samuel Sewell, the Hon. Isaac Parker, Justices. The Grand Jury being impannelled and sworn, viz: Thomas Handyside Perkins, Esquire, Foreman, Samuel Emmons, George Paine, Daniel Tuttle, Joshua Davis, Jedediah Parker, David Townsend, Jonathan Kelton, Moses Gardner, Joseph Francis, Mitchell Lincoln, Samuel Sturgis, Charles Vose, Stephen Gore, Gamaliel Bradford, William Harris, William McNeil Watts, Daniel Dennison Rogers, William Walter, William Shimmis, all of Boston, and Caleb Pratt of Chelsea, the Chief Justice delivered a learned and impressive charge, from which the following extract, as having more immediate relation to the subject of this Report, is copied by permission:—“Felony, affecting life, is either murder or manslaughter. Murder is the wilful killing any person of malice aforethought, either expressed or implied.—The malice is express, when there was a premeditated intention to kill. Malice is implied, when the killing is attended with circumstances which indicate great wickedness and depravity of disposition, a heart void of social duty, and fatally bent on mischief.—Formerly if the husband was maliciously killed by his wife, or the master by his servant, the offence was adjudged to be petit treason; but by virtue of a late statute it is now considered only as murder, and as such is indicted and prosecuted: And every man who kills another, in a duel deliberately fought, is a murderer.—Man-slaughter is the killing another, either wilfully, or through gross negligence, but not

¹ See this case commented on ante, 170—5, 213—4.

² It was understood that suggestions had been received from the Attorney General, that he had some legal objections to the return of the jurors from Boston, upon which it was desirable to have the opinion of the full Court; and that these suggestions were the occasion of the presence of the other members of the Court besides Judge Parker, to whom this session had been assigned. The objections being considered and overruled by the Court, but one judge sat in the trials after the first day, except in the trial of one indictment for murder.

from malice aforethought.—Homicide from accident is excusable; from necessity it is either excusable or justifiable, when for the advancement, or in execution of public justice, it is justifiable.—Observing in the list of prisoners, returned by the jail-keeper, that two persons are in custody charged with felonious homicide, it may be useful to you, in your inquiries, to mention some principles of law, relating to this subject.—In every charge of murder, the fact of killing being first proved against the party charged, to reduce the offence below that crime, by any circumstances of accident, necessity, or human infirmity, he must satisfactorily prove these circumstances, unless they arise out of the evidence produced against him.—When the act which occasions the death is unlawful, yet if malice either express or implied, be wanting, the killing is not murder, but manslaughter, the act being imputed to the infirmity of human nature.—Neither words of reproach, however grievous, nor contemptuous or insulting gestures, without an assault on the person, are sufficient to free the party killing with a dangerous weapon, from the guilt of murder.—An assault is any attempt or offer, with force and violence, to do a corporal hurt to another, as by striking at him, or even by holding up the fist at him in a threatening or insulting manner, or with such other circumstances as denote an intention and ability, at the time, of using actual violence against his person. And when the injury, however small, as spitting in a man's face, or unlawfully touching him in anger, is inflicted, it amounts to a battery, which includes an assault.—Any assault made, not lightly, but with violence, or with circumstances of indignity, upon a man's person, if it be resented immediately, and in the heat of blood, by killing the party with a deadly weapon, is a provocation, which will reduce the crime to manslaughter; unless the assault was sought for by the party killing, and induced by his own act, to afford him a pretence for wreaking his malice. To illustrate this exception, a case is stated of the falling out of A. and B. A. says, he will not strike, but will give B. a pot of ale to touch him; on which B. strikes A., who thereupon kills B. This is murder in A., notwithstanding the provocation received by the blow from B., because A. sought that provocation.—A man may repel force by force, in defence of his person, against any one who manifestly intends, or endeavours by violence, or surprise, feloniously to kill him. And he is not obliged to retreat, but may pursue his adversary, until he has secured himself from all danger; and if he kill him in so doing, it is *justifiable self-defence*. But a bare fear, however well grounded, unaccompanied by any open act, indicative of such an intention, will not warrant him in killing. There must be an actual danger at the time. And, (in the language of Lord Chief Justice Hale,) it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, &c., that his life was in imminent danger; otherwise the killing of the assailant will not be *justifiable homicide*.—But, if the party killing had reasonable grounds for believing, that the person slain had a felonious design against him, and under that supposition kill him; although it should afterwards appear that there was no such design, it will not be murder; but it will be either manslaughter or excusable homicide, according to the degree of caution used, and the probable grounds of such belief.—These principles have been recognised by the wisest and most humane writers on criminal law.—After a due and impartial inquiry into the several cases, that may require your attention, you will ascertain the facts, and afterwards apply the principles of law, to obtain a just and legal result."

On Tuesday, December 2d, the Grand Jury returned into Court, and, amongst other bills, presented the following indictment against Thomas Oliver Selfridge, Esquire:—Commonwealth of Massachusetts.—Suffolk and Nantucket, ss.—At the Supreme Judicial Court begun and holden at Boston within the County of Suffolk, and for the Counties of Suffolk and Nantucket, on the fourth Tuesday of November, in the year of our Lord one thousand eight hundred and six.—The Jurors for the Commonwealth of Massachusetts upon their oath present, that Thomas Oliver Selfridge, of Boston, in the county of Suffolk, gentleman, otherwise called Thomas Oliver Selfridge of Medford, in the county of Middlesex, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fourth day of August, in the present year, with force and arms, at Boston aforesaid, in the county of Suffolk aforesaid, in and upon one Charles Austin, in the peace of God and the said Commonwealth, then and there being, feloniously, wilfully, and of the fury of his mind, did make an assault; and that he the said Thomas Oliver Selfridge, a certain pistol of the value of five dollars, then and there loaded and charged with gunpowder and one leaden bullet; which pistol he the said Thomas Oliver Selfridge, in his right hand, then and there held, to, against and upon the said Charles Austin, then and there, feloniously, wilfully, and of the fury of his mind, did shoot and discharge; and that he the said Thomas Oliver Selfridge, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder, shot and sent forth as aforesaid, the aforesaid Charles Austin, in and upon the left breast of him the said Charles Austin, a little below the left pap of him the said Charles Austin, then and there, with the leaden bullet aforesaid, out of the pistol aforesaid, by him the said Thomas Oliver Selfridge, so as aforesaid, shot, discharged and

sent forth, feloniously, wilfully, and of the fury of his mind, did strike, penetrate and wound, giving to him the said Charles Austin, then and there, with the leaden bullet aforesaid, shot, discharged and sent forth out of the pistol aforesaid, by him the said Thomas Oliver Selfridge, in manner aforesaid, in and upon the left breast of him the said Charles Austin, a little below the left pap of him the said Charles Austin, one mortal wound, of the depth of six inches, and of the breadth of one inch, of which mortal wound aforesaid the said Charles Austin then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that he the said Thomas Oliver Selfridge, the said Charles Austin, then and there, in manner and form aforesaid, feloniously, wilfully, and of the fury of his mind, did kill and slay, against the peace of the Commonwealth aforesaid, and the law in such case made and provided.—A true bill.—T. Handyside Perkins, Foreman; James Sullivan, Attorney General.

The Defendant, being soon after brought into Court and arraigned upon the foregoing indictment, pleaded Not Guilty. Being inquired of by the Court¹ at what time he would be ready for his trial, he prayed for a postponement of it to some future day in the term. He stated that he could not at that time name the day, as he should have occasion to send to a considerable distance for witnesses, whom he believed essential to his defence, of whom he had understood that one was in the District of Maine, and another in the State of New York.—On the motion of his counsel that he might be admitted to bail, which was not opposed by the counsel for the Government, he was ordered to recognise himself in two thousand dollars, with sufficient surety or sureties in the same sum for his appearance *de die, in diem* during the present term, &c.

On Tuesday the 23d day of December, which had been previously assigned by the Court, the trial commenced before the Hon. Mr. Justice Parker.—At nine o'clock the Court opened. The clerk then proceeded to call the jury in the following order:—1. Paul Revere—sworn. Thomas Fracker.—Mr. Selfridge,—I wish to inquire if Mr. Fracker has not formed an opinion on this occasion? Mr. Fracker being sworn to answer, was asked by Parker, J. Have you heard any thing of this case, so as to have made up your mind? Ans. No. Parker, J. Do you feel any bias or prejudice for or against the prisoner at the bar? Ans. No. Parker, J. Swear him. 2. Thomas Fracker—sworn. 3. Isaac Parker—sworn. 4. Micajah Clark—sworn. Ward Jackson.—Mr. Selfridge,—I wish Mr. Jackson to say whether he has not some bias in this case? Mr. Jackson being sworn to answer, was asked by Parker, J. Have you formed any opinion as to the issue of this cause? Ans. No. Parker, J. Do you feel any bias or prejudice for or against Mr. Selfridge? Ans. None. Parker, J. Swear him. 5. Ward Jackson—sworn. Henry Sargent.—Mr. Selfridge,—I object to him as having been one of the Jury of Inquest. 6. Francis Tufts—7. Lemuel Gardner—8. Elisha Learned—9. Ebenezer Goffe—10. John Fox—11. John West—12. Dexter Dana—sworn.

For the Commonwealth, James Sullivan, Attorney General; and Daniel Davis, Solicitor General.—For the Defendant, Christopher Gore and Samuel Dexter.

Clerk of the Court. Gentlemen of the Jury, hearken to the indictment found against Thomas Oliver Selfridge. (Here the Clerk read the indictment, see page 418.)—Clerk of the Court. To this indictment the defendant has pleaded not guilty, and has put himself on the country, which country you are, and you are now sworn to try the issue.

Mr. Solicitor General:—May it please your Honour, and you, Gentlemen of the Jury. You perceive by the indictment that has been read to you, that Thomas Oliver Selfridge is charged by the Grand Jury of the body of this county with the crime of manslaughter. The indictment particularly states that on the fourth day of August, in the present year, he discharged a loaded pistol at Charles Austin, in consequence of which he instantly died. This fact is alleged, in the indictment, to have been committed feloniously, wilfully, and in the fury of the mind of the defendant; and this is the appropriate description of the crime of manslaughter.—It is not my duty, on this occasion to portray the consequences that have resulted from the shocking event which has brought Mr. Selfridge to the bar of his country. It is my more immediate and appropriate duty to explain the nature of the crime, and apply the facts which will be proved to you by the witnesses on the part of Government; I shall then adduce the authorities and cases in the books which are applicable to the present issue. It is impossible for me to discharge this duty with any satisfaction to myself, or any assistance to you, without recurring to the authorities which treat on the subject of homicide. You will find by a recurrence to those authorities, that it will be impossible to understand them, without attending to the subject of homicide at large. It will also be impossible to understand the crime of manslaughter, without a previous acquaintance with the crime of murder. Writers have so blended the different degrees of guilt attached to these crimes, and the shades are in many instances so faintly delineated between them, that it is difficult to be acquainted with the distinction, which it is your duty to make before you can understand

¹ The Hon. Judge Sedgwick was then sitting in the place of Judge Parker.

and decide on the present case. Therefore, I will, before I state the facts and call the witnesses to prove these facts, ask your attention for a few minutes to several passages that will be referred to, merely with a view to define the crime, and which you ought, in the beginning of the cause, to understand. I shall, for your convenience and my own, trouble you no further than to read those authorities which contain the general definition; and then will state the facts which are to be proved by the witnesses that will be adduced, and then read certain rules of law which apply to this case in particular, and having done that, I shall have done all that the Government will require of me on the present occasion. I have not been able to find, by attention to the several treatises on the subject of homicide, any book that will assist you more satisfactorily, or give you a more correct notion of the crime of manslaughter, than what may be derived from the 4th volume of Blackstone's Commentaries, in which the subject of homicide is treated at large. I shall not read at length all that is written, but shall ask your attention to those parts only which treat of the crime of which the defendant stands accused. In 4 Blackstone's Com. p. 177, that learned author says: "Of crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himself, or another, but in some manner, either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation." The author then proceeds to state what would be justifiable homicide; but the crime with which the defendant is charged is not of that nature, and of this I shall say nothing; because, nothing can occur in the present trial, which can render the homicide of that nature.—In pages 180 and 181, he proceeds, in the next place, to consider such homicide as takes place to prevent a crime.—"The Roman law," he says, "also justifies homicide, when committed in defence of the chastity either of one's self or relations; and so also, according to Selden, stood the law in the Jewish republic. The English law justifies a woman killing one who attempts to ravish her; and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds, "that all manner of force, without right, upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every well regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.—In page 183, the author considers that species which consists in self-defence:—"Homicide in self-defence or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or rather, (as some choose to write it) *chaud-medley*; the former of which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion; both of them are pretty much of the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. viii. c. 5, and our ancient books, that it is properly applied to such killing, as happens in self-defence upon a sudden encounter. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant."—In page 188, the learned writer describes the nature of felonious homicide:—"Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done, either by killing one's self, or another man."—I will thank you, gentlemen of the jury, to attend to the

distinction between that offence, and the one for which the defendant stands indicted, and which I am about to state from the same elegant author. In page 191, he says:—"Manslaughter is therefore thus defined, the unlawful killing of another, without malice either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act."—"As to the first, or voluntary branch; if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter; and so it is, if they upon such an occasion, go out and fight in a field; for this is one continued act of passion; and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter."—"There is only one other definition, which I will trouble you, gentlemen, to attend to in the history of this trial; it is the definition of the crime of murder, as given in the 195th page of the same book, in the words of Sir Edward Coke;—"Murder" is therefore now thus defined, or rather described, by Sir Edward Coke: "When a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied," it is murder. He then goes on to give different descriptions of the several branches of murder, which it is not necessary in this state of the trial to trouble you with.—I thought it my duty, gentlemen, to read to you such passages in the book I have resorted to on this occasion, as contained the description of all the different branches of homicide, from wilful murder down to justifiable self-defence.—I will now state my reasons for so doing. So far as I am acquainted with the facts of this case, it will turn out, from the testimony of the witnesses on the part of the Government, that this event happened in such a manner, that it may become a question whether the fact charged by this indictment was murder, or manslaughter.—I do not mean to insinuate that it is possible to convict the defendant on this indictment of a higher species of homicide than manslaughter; but you will find by a recurrence to other books, and on an investigation of the facts, that though he be indicted for manslaughter, if from those facts he might have been found guilty of murder, he must be found guilty of manslaughter. I mention this, because, it is possible, that distinctions of this kind may be set up; that, either the facts amount to murder or to justifiable self-defence, in either of which cases, you must acquit. I say it is possible, because it is out of my power exactly to anticipate on what ground the defendant's counsel will place their defence. But I may suppose, that they will rest it on that. It is therefore necessary that you should have a just idea of this, and I have laid all these things before you that will show you, that you cannot convict of murder on an indictment for manslaughter; for though you find that the facts approach the degree of murder, you must from every principle of public justice say, that the defendant is guilty of manslaughter only.—I will now state to you generally, the facts which will appear in evidence to you on the part of the Government, and before I proceed particularly to state those facts, I will mention that it is necessary that the Government prove these two things; first, that Charles Austin, the person named in the indictment, is dead; secondly, that he came to his death by the instrumentality of the defendant at the bar, and under the circumstances alleged in the indictment; which two facts will amount to the crime of manslaughter. These then are the facts which the Government must prove before it can be entitled to your verdict; and you are to judge from the evidence that will be laid before you, whether these two points are or are not substantiated on the part of the Commonwealth. I expect that it will appear, that on the day mentioned in the indictment, between the hours of one and two o'clock in the afternoon, Selfridge was in his office employed about his ordinary business; that a few minutes before he proceeded from thence into State Street, he had a conversation, in which he mentioned that he anticipated some attack in the course of the day, (probably about 'change hours) and that he then stated a conversation which took place between Mr. Benjamin Austin and Mr. Welch, in which Mr. Austin had threatened to have him chastised; that Mr. Selfridge declared to the person with whom he had that conversation, that he was not a man to engage at fisticuffs, though he was prepared to protect and defend himself; to this, will be added other circumstances which tend to show, that Mr. Selfridge went out of his office with the pistol, which was the instrument of the death of the deceased, and which was deliberately loaded for that purpose. About twenty minutes after Mr. Selfridge went out of his office, down into State Street, and the deceased was then on 'Change, standing near the door of Mr. Townsend's shop; that Mr. Selfridge walked down State Street with his hands in his pocket or behind him, with, probably, an intent to conceal the instrument he had in his pocket, and with which he gave the deceased his death wound; that in passing down in this manner, Austin leaving the place at which he stood, approached him with a stick in his hand; that they met together a few paces from the door of the

shop, and that there a combat ensued. It will appear that the deceased came with a stick in his hand, in a manner to make an assault; but from the evidence we shall introduce, it will be impossible, I think, to decide, whether the pistol was discharged, and the death wound given, before, or after Austin gave Selfridge a blow.—It is not necessary now so very minutely to state the circumstances of this affecting tragedy; I shall rely on the information of the witnesses for these facts, but it will appear from the whole, that this tragedy was performed in the course of twenty seconds at the farthest; the parties met, the pistol and first blow given were discharged, probably at the same instant. Austin then fell to the ground, and soon expired; he was carried into the shop of Mr. Townsend, where his wound was examined, found mortal, and of which he died.—When the people collected, Mr. Selfridge appeared perfectly in possession of his mind; declared himself in a state of recollection, and said, he knew what he had done, and was ready to answer for it at the bar of his country. These were the defendant's declarations; and whether just or not, will come under your consideration.—I mention this to show that he was in the possession of his mind—These are the outlines of this case; these facts, I am confident, from what I know of the former testimony of the witnesses, they will again declare, and, perhaps, something further in favour of the Government. If so, it will be impossible the defendant should escape the punishment the law affixes to the crime. Taking it for granted that I shall prove the facts, it may be convenient at this time to ask your attention to those rules of law applicable to a case of this kind. When I have so done, their applicability will easily be perceived and the cause will be fully opened on the part of the Government. I do not know that the book I have in my hands, has ever been read as an authority. It is 1 East's Pleas of the Crown, which contains the best treatise on the subject of homicide that has been printed; and though it has been but recently published, I presume I may read the authorities adduced by him, in support of what he lays down, as they are the original authorities on the subject.—I will begin by reading some parts of the 19th sec. chap. 5, page 232. If any question is made as to the correctness of the principles, I have Hale, Hawkins, and the other authorities cited, which can be referred to.

Parker, J. There are few authorities in that book, that are not taken from Hale and Hawkins.

Sol. Gen. The part I cite is that which treats of homicide from transport of passion or heat of blood.—“Herein is to be considered under what circumstances it may be presumed that the act done, though intentional of death, or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone. Upon this head it is principally to be observed, that whenever death ensues from sudden transport of passion, or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder. For let it be again observed, that in no instance can the party killing, alleviate his case, by referring to a previous provocation, if it appear by any means that he acted upon express malice.”—I shall now read part of the 21st sec. of the same chapter:—“It must not however be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter. This I know has been supposed by some, but there is no authority for it in the law. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and a diabolical malignity, than of human frailty; it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation. Barbarity, says Lord Holt, in Keate's case, will often make malice.”—I will now read another rule from the 23d sec. page 239:—“In no case, however, will the plea of provocation avail the party, if it were sought for and induced by his own act, in order to afford him a pretence for wreaking his malice. As where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him; on which B. strikes A. and A. kills him: this is murder. And in all cases of provocation, in order to extenuate the offence, it must appear that the party killing, acted upon such provocation, and not upon an old grudge; for then it would amount to murder.”

Gore. The gentleman has stated and laid down principles which I shall oppose; and I may as well take the opinion of the Court now as at any time hereafter. The gentleman has said that on this indictment he shall offer evidence to show, that there was that sort of malice which is described in the same crime of murder. He has stated that by entering into the conversation and antecedent circumstances, he will be able to prove there was a previous malice, and that those circumstances and malice amount to the crime of murder; now the indictment being for manslaughter, negatives all idea of malice; he therefore can give no testimony on the ground of malice, as it does not comport with

crimes stated in the indictment. It is confounding all rules of law, if under this indictment for manslaughter, he should attempt to set up a proof of murder; to this point I quote Hawkins. Book 1, chap. 30:—"Homicide against the life of another amounting to felony is either with or without malice. That which is without malice," I am reading now from the first section, "is called manslaughter, or sometimes chance medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all;" and in the second section he goes on to state, "And from hence it follows, that there can be no accessories to this offence before the fact, because it must be done without premeditation."—Here is an exact definition of the crime of murder, corroborated by other definitions in the books cited, in the margin, which perfectly excludes all idea of malice. Therefore they cannot, under this indictment, attempt, according to any rule of law (that I know of,) to prove malice in my client, for it would make a distinct crime, different from that with which the defendant is charged.

Sol. Gen. I had no inducement to make this statement to the jury, or to intimate the nature of the evidence I should offer, but that of doing what I apprehend to be my duty. I stated that it was impossible for me to anticipate on what grounds the defence would be placed; but if it should turn out that it should be, that the defendant is not guilty of the crime of manslaughter, according to the technical definition of that crime, because the evidence may show that it was either murder, or may tend to prove it justifiable self-defence; that on the first case, it was clearly law, that if, on an indictment for manslaughter, the evidence should show the crime was murder with malice, the jury would be justifiable in convicting him at least of manslaughter. The reason upon which I bottom this opinion is, that they being judges of the facts and of the law as it applies to those facts, they are competent to the decision, and they will find themselves warranted in so doing by the opinion of Judge Holt, delivered in Mawgridge's case, reported by Kelyng, page 125. The principle I lay down, was then recognised, and on the authority of that case, I ground myself on the present occasion. Holt then, after speaking of homicide or manslaughter says,—"The killing of a man by assault of malice prepenze, hath been allowed to be murder, and to comprehend the other two instances."

Parker, J. I see no reason to doubt that principle. If the evidence proves the defendant guilty of a higher crime than that with which he stands indicted; for example, if they prove him guilty of murder, it is competent to the jury, to find him guilty of manslaughter, for which he is indicted.

Attorney General. The books are so full on this point, that it is unnecessary to trouble the Court with the recital of them.

Dexter. I wish to know what is precisely the question, and to what point it is necessary to turn our attention. If it be true, that the whole question before the court and jury, is whether the same evidence can be given on a trial for manslaughter as on an indictment for murder, and it be decided that it can, it appears to follow that the cause is to be tried on principles on which there can be no legal decision; if we are to try on the present occasion for murder, the jury cannot convict nor acquit. It seems to me clear law that no case can be decided but that which is in issue.—The indictment is for manslaughter; the definition of this crime is that it must be committed on a sudden, without malice. If malice aforethought be proved, then no part of the definition is substantiated. We cannot have come here to defend what we are not charged with. We have no objection to go into every fact anterior; but we ought to have had an opportunity to know of this, and of what was intended by the prosecution, and further we ought to have known of it legally, that is by the indictment. The defendant is not prepared to meet suggestions of malice. We are not willing to exclude any facts, but the truth is, that not expecting a charge of this kind, the defendant is not completely prepared; we do not wish to escape from the offence, if it be one; but it ought to have been described with technical precision. We insist that it has not. The authorities exclude malice and premeditation, and we cannot be prepared to meet them, nor is it competent for the Government to show them, nor is it incumbent on us to prove that they were not in existence.

Parker, J. There is no definite motion before the court; the observations now made, arise from what the Solicitor General expected to be able to prove. I understand, that he expected to show a previous preparation, and that what was done by the defendant was not to protect himself from attack. Whether the offence was manslaughter or excusable homicide, depends perhaps on the instrument that was employed, the opportunity to conceal it, whether he carried it before him, or whether he took up a stick in the street to defend himself. The object of the Solicitor General was to show whether it was merely in defence of himself, or whether there was any previous malice; it appeared to me proper to go into evidence to that effect.

Att'y. Genl. There are several authorities to show that this may be done.

Dexter. There is but one, and that is from an opinion of Holt's.

Parker, J. I state this, that if from the evidence admitted, and laid before the jury, they should be of opinion that the crime was of a higher nature, the same facts would prove manslaughter was committed. I believe there can be no doubt of this.

Dexter. We do not hold as law, that if the facts come out to prove this offence to be a higher crime than manslaughter, the jury are to acquit.

Att'y. Gen. If by excluding evidence that would show a previous design, they cannot get rid of this indictment, it would amount to saying, if it be proved that he was guilty of murder, he shall not be found guilty of manslaughter.

Sol. Gen. I was reading to you, gentlemen, a passage from the same authority which occupied your attention when I was interrupted; it was from East's Pleas of the Crown, sect. 23, p. 239:—"And in all cases of provocation, in order to extenuate the offence, it must appear that the party killing acted upon such provocation, and not upon an old grudge; for then it would amount to murder."—And in the next sect. 24, he proceeds,—"But there is another class of cases, where the degree or species of provocation enters not so deeply into the merits of them as the foregoing; and those are, where upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken or sought on either side; if death ensue, this amounts to manslaughter."—The application of this rule will be to that part of the case, by which it will appear that the defendant took an undue advantage, by being secretly armed; a fact, of which the deceased could have no knowledge at the time. I shall therefore next read the latter portion of sect. 30, from the same chapter, page 251:—"It has been shown that such malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature; because the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation, must have entertained at least a general, if not a particular malice, and have before determined to inflict such vengeance upon any pretence that offered."—I will now beg leave to state part of sect. 44, of the same chapter, page 272:—"A man may repel force by force, in defence of his person, habitation, or property against any one who manifestly intends or endeavours, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence."—The next authority, which I shall ask your attention to, is in sect. 47, page 246:—"In another case, however, where the assault, though a very violent one, was plainly with a view to chasten the party for his misbehaviour, and there appeared no intent to aim at his life; his killing the assailant was not holden to be lawful or excusable under the plea of self-defence. That was Naylor's case, tried before Holt, C. J., Tracy, J., and Bury, B. The prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed; his father ordered him to go to bed, which he refused to do; whereupon a scuffle happened between the father and son. The deceased, who was then in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him, and beat him, the prisoner lying upon the ground with his brother upon him, not being able to avoid his blows, or make any escape from his hands. And as they were striving together, the prisoner gave his brother the mortal wound with a penknife. At a conference of all the judges after Michaelmas term, 1704, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity, so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to have intended to chastise him for his misbehaviour to his father; and to excuse homicide upon the ground of self-defence, there must always appear to have been such a degree of necessity as may reasonably be deemed inevitable. At the conference in the above case, Powell, J., put the case: If A. strike B. without any weapon, and B. retreat to a wall, and then stab A, that will be manslaughter, which Holt, C. J., said was the same as the principal case; and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking without any dangerous weapon, that the intent of the aggressor rose so high as the death of the party stricken; and without there be a plain manifestation of a felonious intent, no assault, however violent, will justify killing the assailant under the plea of necessity."—And in the same section it is further laid down,—"In no case can a man justify the killing of another under the pretence of necessity, unless he were wholly without any fault imputable by law in bringing that necessity upon himself."—The next section I shall read is sect. 51, page 279. This section contains a rule and principle directly applicable to the present case, and the most important distinction you will have to take into consideration in this trial, I therefore ask your particular attention to it:—"It has been shown that where death ensues from a combat on a sudden quarrel, without prepense malice, such act amounts but to manslaughter; being attributed to heat of blood arising from human infirmity."—I pre-

sume it will be impossible for the defendant's counsel to place his defence on stronger grounds than the one in this rule. Now the authority proceeds, that in this necessity, which you will probably find to be the precise case of the defendant,—“In order to reduce such offence from manslaughter to self-defence upon chance medley, it is incumbent on the defendant to prove two things: first, that before a mortal stroke given he had declined any further combat, and had retreated as far as he could with safety; second, that he then killed his adversary through mere necessity, in order to avoid immediate death.”—And here you observe it will be a fact of inquiry whether the defendant declined the combat and retreated as far as he could with safety, and then killed the deceased through mere necessity, in order to avoid his own immediate death. If the facts should turn out to be such that the defendant cannot justify himself on one or other of these principles, so long as they remain the rule of law, the defendant must be found guilty.

Parker, J. There is a natural exception to that rule, which you will find in the book you have read; it is, that if the retreat would be such as would cause his own death, then the retreat is not necessary.

Sol. Gen. That forms a part of the rule itself, and is not, I presume, an exception to it. I shall read some authorities to that by and by, and will not trouble you any farther, except for the purpose of reading part of section 55, page 285.—“As to the other point to be established, namely, the existence of the necessity under which the party killing endeavours to excuse himself, he can in no case substantiate such excuse if he kill his adversary, even after a retreat; unless there was reasonable ground to apprehend that he would otherwise have been killed himself. And, therefore, where nothing appeared in Naylor's case above mentioned, to show that the deceased aimed at the prisoner's life; although he held him down on the ground, beating him, and the prisoner could not avoid his blows, it was ruled manslaughter.”—That is the rule to which your Honour referred. The author proceeds:—“It is to be noted in that case, that the prisoner struck the mortal blow with a penknife, which was a dangerous, mischievous weapon; from whence it was to be presumed, that he intended to rid himself of the chastisement which his brother was then inflicting on him, by his death. Mr. Justice Foster, in alluding to this case, seems to lay a stress upon the want of an inevitable necessity, so as to excuse the killing in that manner.”—These principles you will find have a direct application to the present cause; the books which contain them will be adverted to in the course of the trial, by those gentlemen who follow me. I will only read a passage from Foster's Crown Law, and then pass to one or two other authorities; and that will be all that is necessary in the opening. I do this for your information, by which you can apply the evidence more correctly, and also to advertise the defendant's counsel of the books we shall rely on to establish, that the defendant must be convicted of the crime for which he stands indicted. The first I shall now read, is from Foster's Crown Law, page 255:—“In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant, in this instance, standeth just upon the same foot that every other defendant doth: the matter tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them.”—There is a case, 1st, Hale's History of the Pleas of the Crown, page 479. It contains a single sentence only, and very short, but which appears to be directly applicable to the present case. It is this:—“A. assaults B., and B. presently thereupon strikes A. without flight, whereof A. dies; this is manslaughter in B., and not *se defendendo*.”—He further adds, in page 480:—“Regularly it is necessary that the person that kills another in his own defence, fly as far as he may to avoid the violence of the assault before he turn upon his assailant: for though in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy; yet in cases of assaults and affrays between subjects under the same law, the laws own not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.”—One or two other passages in Hawkins, are all that is necessary to trouble you with in opening, and stating the law on the subject. In 1st Hawkins' P. C., chapter 28, sec. 25, page 109, there is a sentence which has a remarkable degree of applicability to the present case:—“However, perhaps in all these cases, there ought to be a distinction between an assault in the highway and an assault in a town. For in the first case it is said, that the person assaulted may justify killing the other, without giving back at all; but that, in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance.”—You will recollect, gentlemen, the scene where this tragedy was performed, and will recollect from that scene, from the circumstances, situation, and possibility of assistance, how immediately applicable the quotation is to the present case.—One other authority I shall adduce,

which will have a reference to the authority I read to you, as to the defendant's being master of his temper and in possession of his mind; it is from page 123, chap. 81, sec. 23 of the book last cited:—"And whenever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration, as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes," &c.—These are the cases and principles which I consider to have a direct reference to the nature of the cause you have to determine. I have now stated the facts, and the only remaining duty for me to perform is to call the witnesses to prove them. But before I do that, I will give you the usual evidence of the death, or first fact—this I shall do by the inquisition taken by the coroner's jury.

Dexter. We object to the reading of that.

Sol. Gen. I read it merely to prove the fact of the death of the person deceased.

Parker, J. I never knew it used, but as I have never been much conversant in trials for homicide, I may perhaps be mistaken.

Att. Gen. It has been the practice to use it.

Gore. It was ten days ago attempted and rejected.

Parker, J. I do not recollect that circumstance.

Att. Gen. It has been used as evidence of the death, and this before the revolution—it was done in the case of the British soldiers, and there admitted to prove the fact of the death—and it was recently offered in the case of Fairbanks of Dedham—it was there objected to and allowed by the court.

Dexter. If limited to that simple object, of merely proving the death, we shall not object to it.

Att. Gen. We will go so far as to leave out the words killed and murdered.

Solicitor General was then about to read the inquisition, but was interrupted by

Dexter. We are unwilling to be troublesome, but we are told by some of the gentlemen of the bar, not now engaged, and who were engaged in the case of Hardy, that this same evidence was offered the present term and rejected by the court.

Blake as amicus curiæ. I recollect the objection, and that I made the motion to reject the evidence, and whether the court decided against it or not, or it was withdrawn, I cannot tell, but I recollect it was not read.

Dexter. Mr. Otis recollects that it was not read; and further, that the Chief Justice overruled it; but if offered for no other object, than to prove the death of the deceased, it is really unimportant; there must, we think be some other design in offering it, and therefore we object to it.

Parker, J. I really should think it, were there other evidence of the fact of the death, very important, because it might prejudice the minds of the jury on the subject; have you not plenary evidence of another sort?

Sol. Gen. Yes, but I do it as being the course of the court; and have no view to create an impression on the minds of the jury; we had agreed to leave out all those words which might have had that effect, and to read it merely to show that the death was occasioned by the injury received from the discharge of the pistol.

Att. Gen. Yielding points will be construed into authorities; if this is evidence to prove the death, we have a right to it, and are not obliged to waive it; the idea of rejecting it because no better is offered is not law; it is either evidence or not; if evidence, then, it may be read; if a thousand witnesses to prove his death should be called, they may not be believed, or may be discredited; the question is, whether it be law, and the inquisition is to be read, to prove the death; if the court say it is not to be read, then I shall never offer it in any other case, except before a full court to obtain their opinion.

Dexter. I stopped in my objections because I understood that it was the invariable practice to read it, for we want no law that is not to apply in every other case; but if, in a recent instance, it has been rejected, we are at liberty to investigate the principles on which its admissibility is attempted to be supported. It is the verdict of the jury in the nature of an inquest of office, where the party charged has no opportunity of examining witnesses; of being heard by himself or counsel; no judge to lay down the law or instruct the jury as to the nature of the offence; is it consistent with general principles that such a piece of testimony should be admitted as evidence? If then there be no usage for it, and general principles are against it, it is clear that it ought not to be received.

Att. Gen. We can show from the authority of Hale and Hawkins, that it is admissible.

Parker, J. As the practice has been, as stated, both ways, I should like to hear some authorities upon the subject.

Att. Gen. We will produce the authorities at another stage of the trial, if they should be necessary.

Sol. Gen. We waive reading the coroner's inquest for the present, and now proceed to call our witnesses.

The Solicitor General called the following witnesses to the stand:—

Doctor Thomas Danforth, having been sworn, testified that on the 4th of August, he was requested by some unknown person, to step into the shop of Dr. Townsend, and there saw the body of a dying man, lying on his back. The shirt was torn down, and the neckcloth taken off; when he discovered a wound a little below the left pap, the pulse was gone, and though still some slight remains of life, there was no respiration. About a minute afterwards, the deceased expired. He then proceeded to examine the wound, and noticed that the fifth rib was cut. At this time, Dr. Jarvis came into the shop.—He then passed the handle of a small hammer about three inches into the wound. He saw from the direction of the wound, that it must have passed through some principal blood vessel; on withdrawing the hammer, blood flowed very freely from it. He was satisfied deceased died of the wound. The direction of the wound was oblique, and diagonal with the trunk of the body, inclining upwards towards the right side. It must have passed through the lungs, but not the heart. He could not say whether it would produce instant death, or a temporary suspension of muscular power—a wound of a large blood vessel might not be attended with instant death, but would produce syncope and death afterwards. Such a wound would produce a momentary spasm, a sort of convulsive, involuntary action.

James Richardson, having been sworn, testified that he was in defendant's office, some little time before the death of the deceased occurred; that defendant gave him that account of the controversy between him and B. Austin; that Mr. Selfridge seemed to have some intimation that he would be attacked, not by old Mr. Austin, but by some bully employed by him. He observed that he would go out, notwithstanding any apprehension of being attacked. He added that he was no man for bullying or fisticuffs. He left the office, and was near the Branch Bank, when he heard the report of a pistol, he thought within four minutes after leaving Mr. T. O. Selfridge's office.

On cross-examination he testified that Selfridge had been his classmate at college;—was never robust or healthy, nor did he mix with his companions in manly or athletic exercises—that at the conversation above mentioned, he was calm and cool.

Benjamin Whitman sworn.—Testified that on the 4th of August, he had seen defendant at his office, and had asked him how he and B. Austin came on; to which he replied, that he, B. Austin, had hired some one to bully him—witness afterwards left him. He said nothing as to mode of defence. He walked on to near the head of the Exchange, when he heard the report of a pistol—turned and saw a person in the act of striking with a cane, the cane was elevated; saw the smoke of the pistol about breast high—the pistol not raised higher than his chin; saw a number of blows struck at him with the cane; saw deceased fall; the parties were quite near each other. About two hours after saw Mr. Selfridge with a wound on his head, and another on his arm; the wound on the forehead was oozing blood at the time; the blow must have been a severe one, the hat was fractured.

John M. Lane sworn.—Testified, that a little after one o'clock on the 4th of August, he was at his shop, looking directly across the street, and there saw defendant standing on the pavement in front of Mr. Townsend's shop, and the deceased standing in front of defendant, a little to the right. Defendant had his arms crossed horizontally, and in that position fired the pistol at the deceased; he turned and gave defendant several strokes before he fell; saw defendant throw the pistol at the deceased while he was striking. There was a number of persons in the street, some fifteen or twenty, between Congress street and Mr. Townsend's shop. Is positive that defendant was facing him; when he fired the pistol he did not extend his arms.

Edward Howe sworn.—Testified same as preceding witness as to time and place, also that defendant had on a frock coat, and his hands were behind him. After passing defendant, he heard loud talking behind him, and turning, saw defendant with a pistol in his hand, which was immediately discharged. The instant afterwards, saw the deceased step forward and strike the prisoner several very heavy blows upon the head; saw defendant throw the pistol at deceased. The instant after the pistol was fired, the deceased sprang from the pavement and struck the defendant as above stated.

Ichabod Frost sworn.—Testified as prior witness as to time and place, also that he was standing at the door of a building directly opposite Mr. Townsend's shop, looking at some persons at the door of the post-office; that he heard the report of a pistol, and turning, saw the smoke, and at that instant saw the deceased step from the side-walk, with his stick up. He struck the defendant several severe blows on the head, and defendant either struck him with the pistol, or threw it at him.

On cross-examination, this witness testified that defendant was six or seven feet from the pavement when he first saw him, with his face towards the post-office. The blows with the stick, and the throwing or striking with the pistol, seemed to be simultaneous. He cannot say that he saw defendant's hands behind him while passing down the street. Did not see defendant retreat with hands raised to ward off the blows; but defendant

appeared to press towards the deceased. When first saw defendant his arm was raised, and aiming a blow with the pistol at the deceased, who was striking with his stick.

Mr. Gore then opened for the defence as follows:—

May it please your Honour, and you, gentlemen of the Jury,—

Permit me, gentlemen, to ask for your candid attention and indulgence, while I address you in behalf of the defendant at the bar, who stands charged by the grand inquest of this county, with the crime of manslaughter. A patient investigation of the evidence, so far as it is necessary to the attainment of the truth, a strict observance of the law of the land as it is derived from the natural character of man, as it is recorded and laid down in our books, as has been invariably known and practised in all civilized countries, as well as in our own, and as it shall be pronounced to you by the court, with a due regard to such arguments and observations as may be founded in reason and common sense, unbiassed by any previous impressions, but what shall be imposed by the law and the testimony, constitute all I have a right to expect, and be assured that, notwithstanding the solicitude I may justly be presumed to feel on this occasion, it is all I have even a wish to obtain.

After the most mature reflections I have been able to give to this cause, and as I trust it will appear to you when the whole transaction is exposed, I cannot prevail on my mind to raise a doubt as to the issue, however important the event may be to the public justice of the country, and however interesting to the property, the freedom and character of my client; provided the case be decided on its own real and intrinsic merits. Yet I cannot but feel some apprehension, from the various measures taken to pre-occupy the public mind, nor is it surprising that I should be thus apprehensive, when I call to mind the cruel, unjustifiable and illegal conduct which has been resorted to through the newspapers, to influence the judgment, to inflame the passions, and cause such an agitation through the whole community, that its effect might be felt even here, where the rights of all require that justice, assisted by the calmest deliberation, should alone preside. Whence should be banished every thing that can tend to stir or move the passions, where every feeling which can disturb the judgment or influence the imagination ought to be extinguished, and no impression admitted but from the unerring voice of truth and of law, which are the same to all men and on all occasions, which bend not to the supplications of mere distress, because extreme or deplorable, nor the clamours of the few, or the many, however overbearing in power, or terrific in threat, however eager and violent in their calls for the sanction of judicial authority, or their own wild and intemperate decrees.

It will not be strange that I should feel something like apprehension, something like dismay when I behold the effect of this excitement in the immense multitude that throng around, and the crowd assembled in this court. Many, no doubt, are brought here by the most laudable motives, on a case the most solemn, affecting an individual in the most tender part, involving every interest that can be dear to man. If any be here with other views, I am sure they have seen, I am sure they will see nothing in the conduct and decision of this cause, but what will convince them of this irrefragable truth, that the liberties, life, reputation and property of every man, essentially and mainly depend on the impartial administration of justice; and this is true at all times, and on all occasions, whatever passion or prejudice, or party spirit itself may whisper to the contrary, or urge as an exception. On the impartial administration of justice, I repeat, depend at all times and on all occasions, the liberties, life, reputation and property of man, and in the very best of times, it is the best reliance, and only solid foundation for the rights of all men.

In evil times, which sooner or later befall every community, it will be found the only protection for the possessions of the rich against the grasp of the needy, and the violence of the profligate; the only safeguard and shield for the rights of the poor and oppressed against the insolence of wealth and power; may we not therefore indulge the hope, that all men, of whatever sect or party, persuaded of this truth, which will be found more apparent, the more it is reflected on, will bring to the altar of public justice their passions and prejudices, however warmly they may have excited the one, or closely they may have clung to the other, as a tribute and willing sacrifice for their own good, and that of their country.

From the nature and circumstances of this case, known as they were or would have been, at the moment of this dreadful catastrophe, which we all deplore, from the age and relation of the deceased to the cause which produced the fatal event, the subject of our present inquiry—the most unfavourable conclusions were made against my client. The deceased was young, just emerging from a state of pupillage to a state of manhood, glowing in all the bloom of youth and pride of strength, to behold him of graceful and well-proportioned form, of athletic muscle and of nervous arm, in a moment stretched lifeless on the ground, his heart's blood gushing in copious streams from his manly face and heart, called forth the commiseration and regret of every beholder. These feelings

almost as instantly changed to resentment against him who was supposed to have done the deed—for of the hundreds, I may say thousands, who saw the last part of this tragic scene, there are not ten, perhaps not five, who saw the whole transaction, and witnessed the necessity imposed on the defendant, with which he could neither equivocate or compromise, of preserving his own life at every expense to him who assailed it. And yet, even of these, some hurried away by the impulses of the instant, and catching the contagion of other men's passions, may have surrendered their judgment to their emotions, and have joined with others in the general execration of the deed, and blaming the conduct of the defendant, have found or thought they found an apology for this strange abandonment of their reason, by assuming the doctrine that no man can innocently spill the blood of another. This is a position unsupportable by any law, human or divine; contradicted by the nature of man, and the very purposes of his creation. I shall contend, and I have too much respect for those I address, to doubt of proving, that every individual has not only the right, but is in duty bound to defend his own life at every hazard and expense of him who assaults it.—The principle of self-defence is founded in the nature and the constitution of man: It is indispensable to, and inseparable from his character. It is not derived from books, nor from the institutions of civil society, though they confirm it. It is born and created with us, co-existent with the first germ of life; conceived, felt, and apparent in the first dawn of our being, and continues the same through all the stages, relations and conditions of human existence. Without this right, and without its exercise whenever the occasion arises, man could perform no duties, and enjoy no rights. He could not discharge even those duties imposed on him by a state of nature, neither could he perform those duties and superadded obligations created by, and incurred in a state of society. If this be true, and that it is, is so self-evident that none will or can deny it, the consequence indisputably follows, that man has not only a right, but is in duty, a duty which he owes to himself, society and his Maker, bound to defend and protect his own life, by all the means in his power, at every hazard and expense of the life of him who assaults him, and whatever the results may be, they are imputable not to him who may destroy, but to him who imposed the necessity. The institutions of civil society are made not only for the whole, but for every part, as well as the whole, and to confirm those rights derived from nature, and which are necessary for the performance of those duties imposed on man by the laws of that civil society itself. The first and fundamental principle in every free government is, that obedience to the government and protection to the subject are reciprocal, and whenever statutes are made to abridge so essential and natural a right as that of self-defence, they are bottomed on this condition implied, as strongly as if expressed in language the most forcible, that the government can and will, by its laws, afford complete and perfect protection. The civil and subordinate rights the subject is forbidden to defend by force, because the laws of society hold out restoration if deprived of them, or a full indemnity for the injury sustained by their loss. Now life once taken away cannot be restored, and for the privation of being there is no indemnity. It follows therefore that society acknowledges and admits, that every man is bound and ordered to protect his own life, when the government cannot do it for him, at every hazard and expense of the life of him who assaults it. Vain and absurd, nay, impracticable would be that statute which would demand of an individual to wait the formal and slow decision of a court of law, when the uplifted hand of violence was ready to end his days, to sink him into the earth far beyond the reach of any earthly tribunal. I have said that the laws of civil society admit and confirm this right of self-defence. They stop not here—they go further. The institutions of civil society authorize and justify a man in taking the life of another who shall attempt to enter his house in the night. They justify the taking of the life of him who shall attempt to rob of the smallest mite of property. The law excuses the man who shall take the life of another on an apparent, though not real necessity of defending his own.

When I come to read to you some of the authorities I shall offer, and which contain the law of our own country, you will be convinced that I have advanced no one principle which they do not warrant, nor do I, gentlemen, wish to extend them beyond their fair import in behalf of the cause I defend. At present, my only object is, by propositions so plain, that they must command the assent of every human understanding, to efface any erroneous impressions which may have been made in relation to the law on this subject.

There is another important, though groundless charge and prejudice, against my client, which I wish and trust to remove. It is founded on this fact, that he had in his pocket a pistol with which he preserved his life, against a man who would have beaten out his brains with a cudgel. An instrument, gentlemen, as effectual for the purposes of death as a pistol, and if we take into view some considerations, far more so; for the pistol, once discharged, is useless against an assailant armed with a stick, and, unless some vital part be struck by the bullet, can do no further injury. But a wrong blow

with a cane may be rectified; a second may be given with more certainty; others may be discharged, and discharged again and again, till the person bring his victim maimed, disfigured and disgraced, dying and dead at his feet.

I wish to bring before you this single fact, the circumstance of wearing a pistol distinct from any relation to the particular state of the defendant, or the reason which, had the law been as is pretended, might and would have justified him in wearing an instrument of this sort. There is no law written or unwritten, no part of the statute or common law of our country which denies to a man the right of possessing or wearing any kind of arms. I say there is no such law, and in every free society a man is at liberty to do that which the law does not interdict, nor can the doing that which is not forbidden be imputed as a crime. But it may be again said, as it has been already, that possessing a pistol is evidence of malice. If it be lawful to possess and wear such an instrument, it would be unjust in the highest degree to make it, unconnected with anything else, evidence to change another act, lawful in itself, into an act criminal and unlawful. For instance, it ought not, and I trust would not, in the opinion of any court or jury, change a justifiable homicide into manslaughter, or manslaughter into murder.

I will attempt to illustrate this by putting one or two cases. Every man has a right to possess military arms of every sort and kind, and to furnish his rooms with them. Suppose a man occupying a house thus furnished, a neighbour comes in, and from some warm conversation an affray ensues, the owner glance his eye on the sword, instantly snatches it from the place where it hung and destroys his neighbour. But for this possession it would, I presume, under such circumstances, be manslaughter; can that possession be so tainted with criminality as to render this crime of manslaughter, murder? If so, do but alter the case: Suppose the visitor, not the occupier of the house, to cast his eye on the sword, and to use the same instrument in the destruction of his opponent, would he be guilty of manslaughter only? The like fact committed by one man would then be murder, and by another only manslaughter. Can the mere circumstance of the not being the owner of the instrument used, change the act from murder to manslaughter?

Further, a man about to travel a road infested with robbers, and knowing it is lawful for him to kill another who attempts to rob him, arms himself with a pistol; on the road he is attacked by a person who means to rob him, on which, in the exercise of his right, he uses his pistol, and destroys the life of the aggressor; if the having a pistol with him be an argument against him, will not that which was a lawful act become an argument to prove it unlawful, and merely from having the precaution to supply himself with what the law authorizes him to carry? Again, suppose a man having occasion to travel a road infested by robbers, and, for the purpose of defending himself and his property, that he provides himself with a pistol; on the way to the road, or on the road, or on his return from it, he is met by a person who attacks him without any intention of robbing, but with a view of assaulting his person only, makes an attack with so much violence, that his life is brought into imminent hazard, on this he uses his pistol and destroys his assailant. Shall you draw, from the fact of his having a pistol, for the just and lawful purpose of defence against one sort of violence, and using it to another equally just and lawful, although not the object of his being so provided, an argument to turn justifiable homicide into the crime of murder? A doctrine which leads to such absurd consequences cannot be founded in truth or justice, and it is on these principles that this cause must be determined. The quality of every act must be according to the intention and design of the agent at the moment. It is by this intention and design that you must decide the quality of the act, not by the manner of doing it or its event. So says our law, and so say the laws of God and of reason. For should a man have an instrument of death for an unlawful purpose, and be compelled to use it for one lawful and just, it would be the extreme of injustice so to tincture this lawful act by an unlawful intention, which was never executed, as to render that criminal which was right and just in itself. For instance, suppose a man armed for the purpose of a duel; he meets in the way to the place of appointment a person who attacks him, and in defence of his own life destroys the assailant. Can you say that the having the pistol would make it a crime? If you can say so, it would be to confound every principle of law and justice: you would decide a lawful and just act to be criminal merely because an unlawful act was intended, which could at the worst, be but a misdemeanor. I draw from these premises this inference, that you cannot make any conclusion against Mr. Selfridge from the circumstance of his having a pistol about him. It cannot be of the smallest weight. For if he had it with an intention that was lawful, it cannot give an unlawful quality to this act of homicide. If he possessed it for any other purpose not lawful, and used it for a lawful end, it will not alter this lawful act. If then you shall be satisfied that the homicide committed was either justifiable, or excusable self-defence, all presumptions which may arise from Mr. Selfridge's

having a pistol with him, are totally destroyed, for presumptions are resorted to only in the absence of express testimony. Wherever there is express evidence presumptions are necessarily excluded; otherwise you will go into the wide field of uncertainty when you have certainty to rely on. If then you are satisfied from all the circumstances which happened at the moment of acting, that it was a lawful act of self-defence, all further inquiry is precluded, and much more so, all presumption or conjecture of unlawful motives, from any preceding act.

For the purpose of enabling you fully to understand the nature of the charge against the defendant, I shall read to you first from 3 Coke's Inst. p. 56.

"Manslaughter is felony, and hereof there may be accessaries after the fact done; but of murder, there may be accessaries, as well before as after the fact."

"Some be voluntary, and yet being done upon an inevitable cause are no felony. As if A. be assaulted by B., and they fight together, and before any mortal blow be given A. giveth back until he cometh unto a hedge, wall, or other strait, beyond which he cannot pass, then in his own defence, and for safeguard of his own life, killeth the other, this is voluntary, and yet no felony, and the jury that find it was done *se defendendo*, ought to find the special matter. And yet such a precious regard the law hath for the life of man, though the cause was inevitable, that at the common law he should have suffered death; and though the statute of Gloucester save his life, yet he shall forfeit all his goods and chattels. Hereof there can be no accessaries, either before or after the fact, because it is not done *felleo animo*, but upon inevitable necessity *se defendendo*. If A. assault B. so fiercely, and violently, and in such a place, and in such manner, as if B. should give back, he should be in danger of his life, he may in this case defend himself; and if in that defence he killeth A., it is *se defendendo*, because it is not done *felleo animo*, for the rule is, when he doth it in his own defence, upon any inevitable cause, *Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.*"¹

I shall now call your attention to Foster's Crown Law, p. 273.

"Self-defence naturally falleth under the head of homicide founded in necessity, and may be considered in two different views."

"It is either that sort of homicide *se et sua defendendo*, which is perfectly innocent and justifiable, or that which is in some measure blameable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law."

"The writers on the Crown law, who, I think, have not treated the subject of self-defence with due precision, do not in terms make the distinction I am aiming at, yet all agree that there are cases in which a man may without retreating, oppose force to force, even to the death. This I call justifiable self-defence, they justifiable homicide."

"They likewise agree that there are cases in which the defendant cannot avail himself of the plea of self-defence, without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defence culpable, but through the benignity of the law, excusable."

"In the case of justifiable self-defence, the injured party may repel force by force, in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable."

"The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by the law of society. For before civil societies were formed, (one may conceive of such a state of things, though it is difficult to fix the period when civil societies were formed,) I say, before societies were formed for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere; and since, in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law, with great propriety and strict justice, considereth them, as *still in that instance*, under the protection of the law of nature."

"Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force; and his servant then attendant on him, or any other person present may interpose for preventing mischief, and if death ensueth, the party so interposing will be justified. In this case nature and social duty co-operate."

There may, gentlemen, be some confusion in your minds from the expression "a known felony." In order to do it away, and explain what is meant when the terms, "of a known felony being intended," are made use of, I shall read some authorities to show you that when there is, from circumstances, an apprehension of this tendency, the party

¹ What every one doeth for the defence of his body, he seemeth to do lawfully.

is excused and may justify the killing his opponent. The first I shall advert to is from East's P. C. 276.

"Other cases have occurred, wherein the question has turned upon the apparençy of the intent in one of the parties to commit such felony as will justify the other in killing him. As *Mawgridge's* case, who upon words of anger between him and Mr. *Cope*, threw a bottle with great violence at the head of the latter, and immediately drew his sword: on which Mr. *Cope* returned a bottle with equal violence; which, says Lord Holt, it was lawful and justifiable for Mr. *Cope* to do; for he who hath shown that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand. The words previously spoken by Mr. *Cope* could be no justification for *Mawgridge*; and it was reasonable for the former to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act, indicating an intention of pursuing his life: and this at a time when he was off his guard, and without any warning. This latter circumstance forms a main distinction between that case and the case of death ensuing from a combat, where both parties engage upon equal terms; for there, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon, suspend his arm till he has warned the other, and given him time to put himself on his guard; and afterwards they engage on equal terms; in such case it is plain that the design of the person making such assault is not so much to destroy his adversary at all events, as to combat with him and to run the hazard of his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood, which has before been treated of."

In the same work, page 273, the author speaking of known felonies, says:—

"There seems, however, to be a distinction between such felonies as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different sort, if no resistance be made by the felon; and therefore a party would not be justified in killing another who was attempting to pick his pocket. But if one pick my pocket, and I cannot take him otherwise than by killing him, this falls under the general rule concerning the arresting of felons. The above is further confirmed by the term *known felony*, made use of in our books, which contra-distinguishes it from secret felonies; and seems to imply that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be *apparent*, and not left in doubt; for otherwise the party killing will not be justified. It must plainly appear, says Lord Hale, speaking of a felonious attack upon B. by the circumstances of the case, as the manner of the assault, the weapon, &c., that his life was in danger, otherwise the killing of the assailant will not be justifiable self-defence.

"Yet still if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition kill him; although it should afterwards appear that there was no such design, it will only be manslaughter, or misadventure, according to the degree of caution used, and the probable grounds for such belief. As where an officer, early in the morning, pushed abruptly and violently into a gentleman's chamber in order to arrest him, not telling his business, nor using words of arrest; and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber, and stabbed him; it was ruled manslaughter at common law, though the defendant was indicted on the statute of stabbing. It is to be inferred from the form of the indictment, and what was said by Lord Hale, that the bailiff had no offensive weapon in his hand, from whence the party might reasonably have presumed that his life or property was aimed at; and therefore there seems to have been a manifest want of caution in not demanding the reason of such intrusion by a stranger; especially as some interval must have elapsed before the sword was taken down and drawn."

From this authority it will appear that the officer went into the room without any weapon, and there could be no inference that he intended any bodily harm, yet it was held manslaughter, but if he had had an offensive weapon, it would undoubtedly have been excusable if not justifiable homicide; this would have been so on the apparent attempt, and therefore if a man has reason to suppose any felony is to be attempted on him, he has a right to defend his own life by taking that of his assailant.

I will now read a case from the opinion of Powell, J., in Naylor's case.

"If A. strike B. *without any weapon*, and B. retreat to a wall, and then stab A., that will be manslaughter, which Holt, C. J., said was the same as the principal case, and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking without any dangerous weapon, that the intent of the aggressor was so high as the death of the party stricken, and without there be a *plain manifestation of a felonious intent*, no assault, however violent, will justify killing the assailant under the plea of necessity."

It would seem here that if the party who kills was resisting a person who had a dangerous weapon, it would be excusable homicide; and Nailor's case, which has been read to you by the solicitor general, turned on that principle; for though the prisoner there was the first in fault, it is clearly inferable, that if the other who was killed had had a dangerous weapon, it would have been justifiable homicide, and not manslaughter, or at most, excusable homicide.

On the same point as to the apprehension of a felony, I shall adduce the same authority, page 293.

"*Hawkins* indeed says, that if a servant, coming suddenly, and finding his master robbed and slain, fall on the murderer immediately and kill him, it may be justified; for he does it in the heat of his surprise, and under just apprehensions of the like attempt on himself. But he adds, that in other circumstances, (which must be understood where he has no just reason to apprehend the like attempt on himself, and the fact is not recent,) he could not have justified the killing of such a one, but ought to have apprehended him. The fact will be either murder or manslaughter, according to the circumstances above alluded to."

You have already heard, gentlemen, that a man has a right to defend his own habitation, by taking the life of another who attempts to enter it feloniously. In the same book from which I last read to you, it is laid down in page 321.

"In civil suits the officer cannot justify the breaking open an outward door or window, to execute the process: if he do, he is a trespasser, and consequently cannot be deemed acting in the discharge of his duty. In such case, therefore, if the occupier of the house resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose for himself and his family. And it is not murder in this case, says Lord Hale, because it is unlawful in the officer to break the house to arrest. Secondly, it is manslaughter, because he knew him to be a bailiff. But, thirdly, had he not known him to be a bailiff, or one who came on that business, it had been no felony, because done in his house. This last instance, which is set in opposition to the second, must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent; and that the party did not know, as in the second instance, nor had reason to believe that it was merely a trespasser with a different intent."

I shall now quote another passage from the same book, of which, perhaps, you will see the applicability as I read, though it may possibly strike you more forcibly after you have heard the evidence. It is from page 278.

"If A. challenge B., who declines to fight, but lets A. know that he will not be beaten, but will defend himself; and B. going about his occasions, and wearing his sword, be assaulted by A. and killed, this is clearly murder. But if B. had killed A. upon that assault, it would have been *se defendendo*, if he could not otherwise have escaped, or bare manslaughter, if he might and did not. But if B. had only made this a disguise to evade the law, and had purposely gone to a place where it was probable he should meet A., then it had been murder; but herein the circumstances at the time of the fact done, must guide the jury."

Thus, if the person who is threatened says, I "will not fight, but I will not be beaten," and under these circumstances meets a man who attacks him, and in resisting that man destroys him, it is justifiable self-defence, and that I take to be the law of this case.

In page 393, which I shall now read to you, you will find principles equally governing the present occasion.

"A mayhem or maim, at common law, is such a bodily hurt as renders a man less able in fighting to defend himself, or annoy an adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or fore-tooth, or castrating him, or, as Lord Coke adds, breking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law. But in order to found an indictment or appeal of mayhem, the act must be done maliciously; though it matters not how sudden the occasion."

You have it in evidence, gentlemen, that the defendant's skull was attempted to be broken, and as the authorities say, if a man be attacked by another with a view to commit a felony, that is, a known felony, as the law terms it, he may take away the life of the assailant. I shall now read a part of the same page, to show that a mayhem is a felony.

"All maims are said to be felony; because anciently the offender had judgment of the loss of the same member, &c., which he had occasioned to the sufferer; but now the only judgment which remains at common law is of fine and imprisonment."

I have quoted these last passages for the purpose of showing that breaking a man's skull is a mayhem, and that every mayhem is a felony. We shall give the most satisfactory proof that the deceased intended to break the defendant's skull.

From a book which has been cited on the part of the government, I shall beg leave to read a few lines; it is from 4 Blackstone's Com. 184.

In the same volume of the same learned author, p. 192, he says:—

"Manslaughter, therefore, on a sudden provocation, differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge."

If, therefore, there was an apparent necessity, and if putting yourselves, gentlemen, in the defendant's situation, you think there was a necessity of preserving his life by taking away that of the deceased, it was done in excusable self-defence.

Manslaughter is a sudden act of revenge; excusable self-defence, when there is an apparent necessity; though it may turn out not to be real, as was the case of the gentleman who was attacked in this room.

That this is the true distinction between manslaughter and excusable self-defence, I refer to

1 Hale's Hist. P. C. 479. "Homicide *se defendendo* is the killing of another person in the necessary defence of himself against him that assaults him."

"In this case of homicide *se defendendo*, there are these circumstances observable."

1. "It is not necessary that the party killed be the first aggressor or assailant, or of his party, though commonly it holds."

"There is malice between A. and B., they appoint a time and place to fight, and meet accordingly. A. gives the first onset, B. retreats as far as he can with safety, and then kills A., who had otherwise killed him: this is murder, for they met by compact and design, and therefore neither shall have the advantage of what they themselves each of them created."

Ibid. 482. "In respect to the manner of the assault.

"If A. assault B. so fiercely that B. cannot save his life if he gives back, or if in the assault B. falls to the ground, whereby he cannot fly, in such case if B. kills A. it is *se defendendo*."

I will now support these positions from 1 Hawk. P. C. 113.

"And now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempt be made upon him in his own house,) kills the person by whom he is reduced to such an inevitable necessity.

"And not only he who on an assault retreats to a wall or some such strait, beyond which he can go no further, before he kills the other, is judged by the law to act upon unavoidable necessity; but also he who being assaulted in such a manner, and such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all."

In the Queen v. Mawgridge, Kel. 120. "The jury found this special verdict: That William Cope was lieutenant of the Queen's Guards in the Tower, and the principal officer then commanding there, and was then upon the guard in the guard-room: And that John Mawgridge was then and there, by the invitation of Mr. Cope, in company with the said William Cope, and with a certain woman of Mr. Cope's acquaintance, which woman Mawgridge did then affront, and angry words passed between them in the room, in the presence of Mr. Cope, and other persons there present, and Mawgridge there did threaten the woman; Mr. Cope did thereupon desire Mawgridge to forbear such usage of the woman, saying that he must protect the woman; thereupon Mawgridge did continue the reproachful language to the woman, and demanded satisfaction of Mr. Cope, to the intent to provoke him to fight; thereupon Mr. Cope told him it was not a convenient place to give him satisfaction, but at another time and place he would be ready to give it to him, and in the meantime desired him to be more civil, or to leave the company; thereupon John Mawgridge rose up, and was going out of the room; and so going did suddenly snatch up a glass bottle full of wine then standing upon the table, and violently threw it at him, the said Mr. Cope, and therewith struck him upon the head, and immediately thereupon, and without any intermission, drew his sword, and thrust it into the left part of his breast, over the arm of one Robert Martin, notwithstanding the endeavours used by the said Martin to hinder Mawgridge from killing Mr. Cope, and gave Mr. Cope the wound mentioned in the indictment, whereof he instantly died. But the jury do further say, that immediately, in a little space of time, between Mawgridge's drawing his sword and the giving the mortal wound by him, Mr. Cope did arise from his chair where he sat, and took another bottle that then stood upon the table, and threw it at Mawgridge, which did hit and break his head; that Mr. Cope had no sword in his hand drawn all the while; and that after Mawgridge had thrown the bottle, Mr. Cope spake not. And whether this be murder or manslaughter, the jury pray advice of the court."

In delivering the opinion of the judges upon this verdict, Holt, C. J., has the following passage—page 128:—

“In the second place, I come now to consider whether Mr. Cope's returning a bottle upon Mawgridge, before he gave him the mortal wound with the sword, shall have any manner of influence upon the case; I hold not. First, because Mawgridge, by his throwing the bottle, had manifested a malicious design. Secondly, his sword was drawn immediately, to supply the mischief which the bottle might fall short of. Thirdly, the throwing the bottle by Captain Cope was justifiable and lawful; and though he had wounded Mawgridge, he might have justified it in an action of assault and battery, and therefore cannot be any provocation to Mawgridge to stab him with his sword. That the throwing the bottle is a demonstration of malice, is not to be controverted; for if upon that violent act he had killed Mr. Cope, it had been murder. Now it hath been held, that if A. of his malice prepense, assault B. to kill him, and B. draws his sword and attacks A. and pursues him; then A. for his own safety gives back and retreats to a wall, B. still pursuing him with his drawn sword, A. in his defence, kills B. This is murder in A. For A. having malice against B., and in pursuance thereof endeavouring to kill him, is answerable for all the consequences of which he was the original cause. It is not reasonable for any man that is dangerously assaulted, and when he perceives his life in danger from his adversary, but to have liberty for the security of his own life, to pursue him that maliciously assaulted him; for he that hath manifested that he hath malice against another, is not fit to be trusted with a dangerous weapon in his hand. And so resolved by all the judges, 18 Car. 2, when they met in preparation for my Lord Morley's trial.”

Having read to you, gentlemen, the authorities which confirm and go, indeed, beyond the principles I stated, I will proceed, before I remark on the testimony adduced on the part of the government, to call some witnesses which the gentlemen on behalf of the commonwealth called, but did not choose to examine; that we may obtain from them the whole of the testimony respecting this transaction.

The first witness for the defence was—

John Bailey, sworn.—Testified that on the 4th of August, a little before one o'clock, he saw Charles Austin pass down the street; afterwards pass up; return and take his stand directly in front of where witness was at work. Young Mr. Fales was with him; he carried in his hand a stick of an unusual size. Soon after saw defendant pass down the street with his right hand in his pocket, and his left hanging down. When Mr. Selfridge first came in sight, deceased was standing on the pavement in conversation with Fales, and playing with his cane. The moment the defendant caught his eye, he stepped quickly from the pavement into the street, toward the defendant, with his cane raised, the upper, or largest end in his hand. The cane was uplifted and actually descending, at the time the pistol was discharged. The blow was not struck till after the pistol was fired. The first blow was a long blow, and staggered the defendant; the deceased struck four or five blows after the first. After the first blow, which was upon defendant's forehead, he held up his hands to ward off the blows, and, as they were repeated, he aimed a blow at the deceased with his pistol. There was the usual number of persons on the exchange: when Austin left the sidewalk with his cane raised, no one attempted to stop him. Had Mr. Selfridge pursued his course, and Mr. Austin stood still, they would have passed at a distance of ten or twelve feet.

Zadock French, sworn.—Testified that about one o'clock on the 4th of August, saw Selfridge coming around the N. E. corner of the old State house; he walked very deliberately, with his hands behind him, or under his coat. When opposite me, he turned towards me; at the same moment Austin stepped quickly towards him, from the pavement, with his cane raised. He made towards him as a man would rush upon a wild beast; defendant presented a pistol as if to defend himself. Austin struck the defendant a blow on the head, and at the same instant the pistol was fired. The defendant did not advance toward the deceased after he turned; he stepped one foot back as if to put himself in a posture of defence. After the fact, when the people cried out, “Who is the damned rascal, who did it?” Mr. Selfridge said, “I am the man.” The defendant took hold of the cane after the firing of the pistol, but the deceased recovered it, apparently with great ease. When Mr. Austin advanced on the defendant, the end of the cane which he held, was even with his hip, and the other end elevated about to the height of his shoulder. At the moment Mr. Selfridge turned, deceased was stepping towards him. No time passed between taking out the pistol and firing it. The whole was instantaneous.

Richard Edwards, sworn.—Testified the same as preceding witness—but was unable to say whether, when he saw the cane elevated, it was descending to strike, or recovering from a blow. Saw Mr. Selfridge raise his arms, but cannot say whether to give blows or ward them off. The first blow was not so severe as some that followed. The
I must have struck that or the shoul-

der. The pistol glistened so, that I saw it very plainly. It was four or five seconds after I had seen him walking with his hands behind him, that I saw the pistol in his hand; the deceased was then rapidly advancing towards defendant, with his stick raised to his shoulder.

Zadock French, recalled.—After the first blow, and the pistol was discharged, the deceased struck several blows. Defendant, finding the blows repeated, struck at deceased with his pistol. Mr. Austin made a mis-step, and sallied two or three paces down the street, when defendant threw the pistol at him, which missed its aim. When Mr. Selfridge had hold of the cane, the deceased recovered it with great ease; he took it with as much ease as a man would from a boy.

William Fales, sworn.—Testified as to the whereabouts of the deceased on the day of his death, prior to his meeting with defendant; and continued, when Austin left the sidewalk, my back was toward the street. He moved very rapidly; Selfridge was standing with his face toward the post-office; deceased was opposite to him, with his cane raised. Cannot say that a blow was given before the pistol was fired. Did not see the pistol till it was thrown. The parties, when I first saw them, were three or four feet apart. The deceased stated, before the meeting with the defendant, that so long as he remained connected with the college, he could not, consistently with that connexion, take any notice of the publication of the morning, but that after he left college, neither T. O. Selfridge, nor any one else, should asperse his father with impunity. He usually carried a rattan, except when he walked to Cambridge, when he frequently carried one as large as the one he then had. He was eighteen years of age, tall, but not stout, and was not called strong.

Horatio Bass, sworn.—Testified to the same facts as the preceding witness. It was impossible for him to say which was first, the blow with the cane, or the pistol shot. Could not say that the first blow hit Mr. Selfridge. After the pistol was discharged, Mr. Austin struck three or four heavy blows with his cane, and Mr. Selfridge struck two or three times at Mr. Austin's face with his pistol, but cannot say that he hit him. Mr. Austin sallied, and defendant threw his pistol, which passed the deceased without hitting him.

John Erving, sworn.—Saw Austin with his cane raised, moving rapidly, but not running, towards defendant, who had his arm lifted as if to parry a blow. He took a pistol from his right-hand pocket, and fired under his arm. The first blow, and the firing of the pistol, seemed to be at the same instant. At the fourth blow, Selfridge caught hold of the stick; Austin recovered it, and fell immediately afterwards. The blows were heavy.

William Shaffer, sworn.—About a quarter past ten o'clock in the morning of the 4th of August, Mr. Charles Austin came into my shop, and picked out a cane; he bent it, and asked me if it was a strong one, and would stand a good lick—it was a good piece of hickory—heavy for hickory. He had usually bought small India joints. Had sold canes to him for about six months. He had bought as often as one a-week, and always small bamboos.

Lewis Glover, sworn.—Was present at the affray—saw a young man step quickly from the sidewalk, with his cane lifted. Selfridge had his hands behind him, but quickly turned; when deceased came up to Mr. Selfridge he struck him on his hat; while he was aiming the second blow, Selfridge presented a pistol and fired it. Had a full view of the whole transaction; was within fifteen feet of the parties, and kept my eye on them steadily. Am confident there was one blow before the pistol was fired; the blow before the pistol was fired was a violent one, sufficient to knock down a man who had no hat on. Austin struck three or four blows after the first, before he fell. Went on 'change with expectation of seeing an affray. There were a good many persons upon 'change—there were not many near the spot—none between me and the parties. If there were words spoken before the blows, I did not hear them; there was not much time for words—the thing was done instantaneously. Did not observe the hat was broken from the first blow.

John C. Warren, sworn.—Called on the evening of 4th of August, to visit defendant; found large contusion on the forehead of defendant, about the middle of it; it was three inches in length, two in breadth, and one in depth; think the skin was not broken through. Defendant must have received the blow through his hat. The centre of the blow was about the turn of the forehead, part in front, and part under the hair. Witness was asked, if such a blow, in his opinion, would probably have fractured the skull, had not the hat intervened. Objected to—objection sustained.

Lewis Glover, recalled.—Defendant's hat was on at the time of the first blow; deceased struck directly upon the hat.

Dr. Warren, recalled.—Cannot say whether the blow would have fractured his skull or not. It was on a part of the skull very liable to fracture. The wound was about the middle of the forehead—not a wound, but a contusion only. At college defendant was

feeble in muscular strength, more so than any young man of his size in his class;—had no knowledge of his having lost the use of his limbs by sickness.

William Ritchie, sworn.—Have the hat Mr. Selfridge wore—received it from him in prison. It is broken on the edge of the crown, in front. I saw the hat was broken before we left the street. When defendant went into my house, I took the hat, examined it, and found it as I have described. Was near the Fire and Marine Insurance office, heard some one exclaim, "Selfridge has shot Austin"—heard the pistol—ran to the spot, and saw the parties engaged. Selfridge's hands were raised—whether to strike or ward, I cannot say. When I got to Mr. Townsend's shop, Austin had fallen. Defendant said four or five times, "I am the man." When I observed to him that he was agitated, he said, "Not so much as you are." Mr. Selfridge desired that the people might be told that he was going to my house.

Duncan Ingraham, sworn.—On the evening before the fatal occurrence, Mr. Selfridge was at my house in Medford. I desired him to get an execution for me, on a judgment he had obtained for me. He agreed to give it me on 'change the next day.

Dr. James Jackson, sworn.—Saw defendant in prison on the evening of the 4th—examined his wound—it was three inches long, near two wide, and elevated above the surface of the skin about half an inch; skin broken near the centre; it was bleeding when I saw it. If he had had a hat on, it would have covered the part where the blow was received. Knew health of defendant was very feeble—he told me he had lost the use of his limbs, but do not recollect that he expressed any fear of the return of the complaint.

Dudley Pickman, sworn.—Testified that Mr. Lane was sitting within his shop, when the report of the pistol was heard, he then rose and went to the door, and I followed him. Saw Selfridge with his hands raised to ward off the blows that the deceased was giving. I went out of the door directly at Lane's back.

John Brown, sworn.—Knew that Selfridge in the early part of his life, lost in a great measure, the use of his limbs, before he went to college. As far as I knew him, was always a weak and feeble young man.

Dr. Isaac Rand, sworn.—Testified in regard to the wound on defendant's forehead, the same as prior witnesses. A fortnight afterwards there were still very visible marks of the blow. This witness gave much evidence as to the probable effect of the blow upon defendant's forehead; and the nature of the blow upon the deceased relative to its influence upon his muscular action, immediately upon the wound being received.

Warren Dutton, Esq., sworn.—Testified as former witnesses, as to the position of defendant's hands immediately before hearing the report of the pistol. Could not say, however, whether they were folded behind him or under his coat.

Lemuel Shaw, Esq., sworn.—Testified to obtaining a writ of possession in favour of Duncan Ingraham, from defendant, while in prison; did not recollect the date of writ. Occupied the same office with Mr. Selfridge. Did not recollect seeing any pistol in his office on the day of the affray. Defendant had kept, many months before, a pair of pistols in his desk. Was in the office when he went on 'change. Did not leave the office till I heard the report of the pistol; defendant usually rests his hands by folding them either behind or before him, or supporting them in the arm-holes of his jacket. Thinks the pistol presented in court, one of those which defendant kept in his desk.

Henry Cabot, Esq., sworn.—Testified to notifying defendant that he was to be attacked. This was inferred from a conversation with Mr. Welch. Told defendant he was to be attacked, I thought, by some bully; from having seen a stout, athletic person, with a horsewhip in his hand, standing near defendant's office. Defendant gave me to understand that he was ready, or something to that effect. Do not recollect his words.

John Brooks, sworn.—Saw defendant going down towards the exchange—was walking slowly, with his hands hanging loosely behind him, outside of his coat—saw his hands—he had no pistol in them—lost sight of him when one-third across the street,—his hands were behind him, without a pistol, as long as I saw him.

Mr. French, recalled. His right hand was in his pocket, his left held up. I am clear I saw him put his hand in his pocket and take out the pistol.

Some witnesses were here called for the commonwealth, whose testimony is as follows:—

Wm. Donnison, Jr., sworn.—Testified to deceased being known to defendant. Austin was always neat in his dress and person—about eighteen years old—noticed that deceased had a new stick on the morning of the 4th of August—deceased said he had purchased it that morning. I knew he had broken his own stick the Saturday before. Never saw him with so large a stick before.

Rev. Charles Lowell, sworn.—Saw Mr. Austin on the day he died; was introduced to him at the house of Captain Prince, that morning. Had some conversation with him, he appeared to be a pleasant young man. I left him there—it must have been about the middle of the day, a little before noon. The Attorney General here made a motion

that evidence be admitted to prove that the defendant's threatening to defend himself, was from his intent to draw the father of the deceased, or his family and friends, into mortal combat. No opinion on the legality of the evidence given by the court, but evidence admitted.

Jonathan Hastings, sworn.—Saw deceased on the day of the affray. Saw defendant after hearing the report of the pistol. Mr. Ritchie had hold of defendant, requesting him to go away. Defendant said, "I am not at all agitated—I am the man."

Hugh Rogers Kendall, sworn.—A little past one o'clock on 4th of August, in passing State street, heard the report of a pistol—turning, saw Selfridge and another engaged; he was striking Selfridge with a cane. Saw the pistol in Selfridge's hand. Mr. Austin struck two pretty smart blows; the two or three which he struck afterwards, were faint. As Austin fell, it appeared that defendant struck him with his fist.

Israel Eaton Glover, sworn.—Lived with defendant in his office. On Saturday before the affray he sent me to buy some lead, but I did not get it. He then gave me 4½d. to buy some shot, he said it was no odds what sort. I bought the money's worth—it was small shot. Was in the office on Monday; defendant came to town between nine and ten o'clock. Saw no pistol in the office on the day of this affair, but had before. There used to be two of them; for about three or four weeks there was one missing. I saw Mr. Selfridge put the shot in his pocket. Usually go home to dinner at one o'clock. Went home that day just before one, not more than three or four minutes. I went out and came in again; Selfridge said, "Is it not time for you to go to dinner?" I said, not quite. He said I might go. Have seen powder in Mr. Selfridge's office: some time before, a man brought some to the office.

Thomas Welch, Esq., sworn.—Defendant requested me on Tuesday, 29th July, to deliver to Benjamin Austin, Esq., a letter, of which the following is a copy, which I did on that day.

MR. BENJAMIN AUSTIN,

Boston, 29th July, 1806.

Sir:—My friend, Mr. Welch, will deliver you this note, and receive any communication you may see fit to make.

You have to various persons, and at various times and places, allged, "that I sought Mr. Eager, and solicited him to institute a suit against the Committee (of which you were Chairman,) who provided the public dinner on Copp's Hill, on the fourth of July," or language of similar import. As the allegation is utterly false, and if believed, highly derogatory to any gentleman in his professional pursuits, who conducts with fidelity to his clients, integrity to the courts, and with honour to the bar: you will have the goodness to do me the justice, forthwith, to enter your protest against the falsehood, and furnish me with the means of giving the same degree of publicity to its retraction, that you have probably given to its propagation. I had hoped the mention of this subject to you yesterday, would have spared me the trouble of this demand;—that twenty-four hours would have enabled you, without difficulty, to have obtained correct information as to the fact; and that a just sense of propriety would have led you to make voluntary reparation, where you had been the instrument of injustice:—The contrary, however, impresses me with the idea, that you intended a wanton injury from the beginning, which I never will receive from any man with impunity.

I am, sir, your humble servant,

[Signed,] THO. O. SELFIDGE.

Mr. Austin, after reading the letter, observed that he could say nothing further than he had to Mr. Selfridge, yesterday. The next morning Mr. Austin met me, and observed that he had made inquiry concerning the truth of the report, and was convinced of its falsity; that he had been to those persons to whom he had mentioned it, for the purpose of removing the unfavourable impression which the report, if true, would make. He observed that it was not true that he had used Mr. Selfridge's name. I stated to Mr. Selfridge on my return, what I have just related. He replied that his name had been used, and that which Mr. Austin stated was not true. The same day, July 30th, I saw Mr. Austin, and told him that Mr. Selfridge was not satisfied with the result of the conversation of the morning; and that he conceived he had a right to demand of him the means of counteracting the effects of the falsehood. He answered that he entertained a different opinion, and did not think anything more could reasonably be expected of him. On Thursday, 31st of July, I was prevented from calling on Mr. Austin with a letter, of which the following is a copy, and which was not delivered till the next day.

MR. B. AUSTIN,

July 30th, 1806.

Sir:—The declarations you have made to Mr. Welch are Jesuitically false, and your concession wholly unsatisfactory.

You acknowledge to have spread a base falsehood against my professional reputation. Two alternatives, therefore, present themselves to you; either give me the author's

name, or assume it yourself. You call the author a gentleman, and probably a friend. He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen your friend, you must acknowledge it under your own hand, and give me the means of vindicating myself against the effect of your aspersion.

A man who has been guilty of so gross a violation of truth and honour, as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word for present indemnity, and future security. The positions I have taken are too obviously just to admit of any illustration, and there is no ingenuous mind would revolt from a compliance with my requisitions.

I am sir, your humble servant,

[Signed,] THO. O. SELFRIDGE.

As soon as he read the letter, he observed that he did not expect to hear from Mr. Selfridge again; that he had done all which could be reasonably expected of him in the matter. He stated that he had nothing more to say, and would give no further satisfaction. This I communicated to Mr. Selfridge, who said that he would not relinquish the pursuit until the foul imputation which had been cast upon him was removed; that his means of redress were reduced to a triple alternative, a prosecution, chastisement, or posting. The first he said was too tardy, and failed to reach the extent of the injury; the second, from his imbecility, was impracticable; and his only remaining alternative was posting. The following is Mr. Selfridge's note, published in the Boston Gazette of August 4th.

Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases—I hereby publish said Austin as a coward, a liar, and a scoundrel; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof.

Boston, 4th August.

THO. O. SELFRIDGE.

P. S. The various editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town.

About nine o'clock on Monday morning, the 4th of August, Mr. Austin met me; he said "he should not meddle with Selfridge himself, but some person on a footing with him should take him in hand." I saw defendant on Sunday at Medford, he never expressed a vindictive spirit against Mr. Austin, he wished to have the matter accommodated. I always conceived that Selfridge wished Austin to sign something, to show that he had circulated a falsehood. There was a total refusal on the part of Mr. Austin to put anything on paper.

Benjamin Austin, Esq., sworn.—Met Mr. Selfridge about the 20th or 22d of July, in Court street; he came to me and said he understood from Captain Scott, I had used his name improperly. I replied that I had never made use of his name. As we went down the street, Mr. Selfridge said that it was an injury to his character. I said I had conversed with Mr. Scott, but as his name was not mentioned, it could not affect his character. On the 28th or 29th of July, I received from Mr. Welch the letter which has just been read. After I had read it, I went to see Mr. Scott, and asked him if I had used Mr. Selfridge's name. He said I had not. Mr. Welch appeared perfectly satisfied. A few days afterwards I received another letter, which was also brought by Mr. Welch. I then asked what more was wished for. Mr. Welch answered that the contradiction had only been made verbally, and Mr. Selfridge wished me to sign a paper. I told him I did not know that I could do anything more than I had done. He asked me if that was my only answer. "I said, I do not know of any further that I can make." He went away, and I heard nothing more of the business till I saw the publication in Monday's paper. Mr. Welch mentions that I said I would get some one to handle Selfridge; I said no such thing. I had no thoughts of assaulting him. I appeal to God, he would have passed me as safely as he stands here at your bar. I saw my son on 'change four or five minutes before the event took place. I did not expect him there; I never said a word to him on the subject of this dispute. My son usually walked with a small cane, but he had one with which he used to walk to Cambridge, twice as large as the one produced. Do not recollect that Fales told me my son struck Selfridge before the pistol was fired.

Thomas Melville, Esq., sworn.—I was in Mr. Lane's shop at the time of the occurrence; heard the report of the pistol, and asked what it was. Lane replied that it was Mr. Selfridge, he has killed a man. I asked if it was Austin; he said "No, it was some young man, whom he did not know." I went into the street and saw Selfridge; went up and tapped him gently on the shoulder, and desired him to go away. He answered me civilly, that he had no intention of going away. In Mr. Lane's shop, the

street door and the shop door both fall together, so that standing in either, one can see directly across the street. Lane was standing full in front of the street door.

Henry Flagnor, sworn.—Mr. Lane was standing at the front door, he had been sitting; but before the pistol was fired he had gone to the door.

The following witnesses were called by the defendant's counsel:—

Daniel Scott, sworn.—Mr. Austin told me that a federal lawyer had been to the tavern keeper, to persuade him to institute a suit against the Committee. He did not state the lawyer's name, but I understood from what was said, that it was Mr. Selfridge. Mr. Austin mentioned after this, that he had received one or two letters from Mr. Selfridge, but would take no notice of them.

Abraham Babcock, sworn.—On the 28th of July saw Mr. Austin. He inquired of me how Mr. Selfridge came to be employed in this matter. I told him I did not know. He replied that he sought it, or went after it, I can't say which expression he used. I told Selfridge what Austin had said. Selfridge requested me to give him this in writing, which I declined to do; he made a minute of it himself. This was about a week before the affray.

Deacon Warren (called by the prosecution,) sworn.—I was in the street, and heard the report of the pistol; turned and saw the young man strike defendant several blows with a cane. Afterwards heard Selfridge say he was not going to leave; he was ready to answer for what he had done.

Nathaniel P. Russell (by prosecution,) sworn.—Heard Mr. Austin say that the action was commenced by a federal lawyer, at his own solicitation; heard no name mentioned, but was led to believe it was Selfridge that was meant. Never heard Mr. Austin contradict this.

Daniel Scott, recalled.—When Mr. Austin mentioned this matter, he did not say it in a light and trifling manner.

M. Carroll.—I was opposite the post-office; heard a pistol fired behind me, and ran round to see what was the matter; saw Selfridge and Ritchie together. Ritchie said to Selfridge that he was extremely agitated, to which defendant replied, "I am not agitated—I have done what I intended to do, or meant to do."

Benjamin Austin, recalled.—Never told any one that I had destroyed the letters sent from Mr. Selfridge. I went to the Insurance Office, and there made a declaration that I had been misinformed as to the circumstance about the federal lawyer. Mr. Scott told me I had not used Mr. Selfridge's name.

John Osborn, sworn.—Was at B. Austin's on the evening of the 4th of August. Heard young Fales tell Mr. Austin that he was in State street with young Mr. Austin and some other gentlemen; on a sudden, young Austin stepped from them. He then turned round and saw Mr. Austin strike the defendant one blow, and then the pistol was discharged. Benjamin Austin was present, and attentive to the conversation, and asked many particulars. Do not recollect that this statement was made more than once.

Perkins Nichols, sworn.—Testified to hearing young Fales tell Mr. Austin that his son had said, "I must be in State street;" that he urged him to give up his cane; but that he refused. Remainder of testimony same as preceding witness.

John Parkman, sworn.—Heard Fales say, about five minutes after the event, that there was one blow before the pistol was fired. Am certain he said so.

William Fales, recalled.—I believe Mr. Parkman's relation is pretty correct. Do not recollect seeing these gentlemen at Mr. Austin's in the evening; was much confused and agitated. Am not able now to say whether the blow was before or after the pistol was fired. I have testified according to the best of my recollection and belief.

James T. Austin, Esq., sworn.—Was at Mr. Austin's in the evening—everything was in great confusion; we could get no distinct account from Mr. Fales. Remember he said deceased had struck several blows, but do not recollect any distinction being made between blows before and after the pistol-shot.

Joseph Wiggin, sworn.—Was on 'change; saw deceased there with a cane. Saw Selfridge come round the corner of the State house. Heard a sound as of a stick struck upon a coat; turned and saw defendant present his pistol and fire at deceased, who afterwards struck two or three blows more. Was about two rods from the place.

James Cutler, sworn.—The Gazette is printed in my office; the note, "Austin posted," was printed at the request and on the account of Mr. Selfridge. I hesitated about publishing it. He wished it delayed until the last moment, until we should have seen his friend, Mr. Welch. On Sunday I called on Mr. Welch, he told me nothing had been done; and gave me no direction about omitting to print the note.

Ephraim French, sworn.—Saw Selfridge coming from the State house, walking very deliberately. Young Austin went from near where I was standing. As he advanced towards Selfridge I saw the pistol go off. I should say that the pistol was one or two seconds before the first blow was struck. Did not see any cane raised before pistol was

fired. I looked particularly at Mr. Selfridge from the time he came in sight. After he had fired he held up his hands to defend his head, and afterwards threw the pistol. No person stood between me and the parties; I saw them distinctly, having gone out of the shop before they met.

Eber Eager, sworn.—This witness's testimony went to disprove any improper solicitation of the suit against the Committee, by the defendant.

Mr. Gore then proceeded in the following manner:

May it please your Honor, and you gentlemen of the Jury.—After having made a few preliminary observations which I thought pertinent, merely with a view to placing you in a situation, in which I presume you are disposed to be placed, that of being free from every bias or prejudice; and I in the like manner, wish to be heard, as the Attorney General said he was disposed to be heard, that is, as if this were a cause between two indifferent persons of whom you know nothing; for that I presume to be the very essence of justice; and if it were possible that a court and jury should ever decide the suit before them, abstracted from the parties, and merely by fictitious names, we should have decisions more correct than we now have; not that I mean to find fault with our own jurisprudence, or the organization of our courts, but it is sometimes impossible to be unaffected by the parties who are to be benefited or to suffer. It was therefore that I took the liberty to remark on the danger of prejudice, and to illustrate it by propositions so simple and plain, that they would receive the assent not only of the minds to which directed, but of every human being to whom they could be addressed. The consequences that followed were so natural and necessary, that they could not be mistaken, and I did flatter myself, and I do flatter myself that they apply to the cause I now defend.

Having stated the law, from the several authorities which I have read in support of the principles I laid down, I went into the examination of the evidence, and you have heard it with an attention and patience which will enable you to determine this issue according to the dictates of impartial justice.

This is a day of anxiety and solicitude to my client, and of interest to his counsel; yet I can say that it is a day of humble hope and tranquillity; a day of firm confidence in the truth and justice of his case, for it is on these that he must depend for his acquittal, and on these alone does he wish to depend. I should say, this was to him a day not only of consolation, but of joy, if joy could be presumed to enter the heart of a man who for more than four months has been immured within the damp and unwholesome walls of a prison, when his constitution demanded free and open air, who required liberty for the discharge of the usual duties of life, but who felt himself at that time subject to the most unfounded calumny, yet would not from his respect to the laws of his country reply; for though he could have replied, he did not. No speeches were made, no observations were addressed to the public, except to request that they would not prejudge his cause, but wait patiently for the time when he might have it in his power to state fairly to the world, the law and facts of his case; when he would put himself on trial by his country, which country, you, gentlemen of the jury, are; and it is now on that law and on those facts, as they shall be laid before you, that he is willing to depend for his acquittal. With respect to the law, it is my duty, and I have no disposition to go beyond it, to state the principles as they have been read to you from the books; to ascertain what it is in this case, and when that is done, to state the facts, that you may apply the one to the other, and come to a just issue. The law I read to you, is not of this day; it is not novel, or of recent date. It is older than any of us, older than society, old as nature herself. It is founded in nature and in the principles of society, and without it man could not exist.

Of the authorities that were read, one of the first was from Lord Coke, who says, that if A. assault B. so fiercely and violently, and in such place and in such a manner, that if he should give back he should be in danger of his life, B. may defend himself, and if in that defence he killeth A. it is *se defendendo*, because it is not done *felleo animo*. The rule is, *Quod quis oh tutelam corporis sui fecerit, jure id fecisse videtur*. That is, whatever a man does in preservation of his person he does not do feloniously. This I take to be the sense of the doctrine laid down by Lord Coke.

I took the liberty of reading another authority from Grotius; one of the first and brightest ornaments of the age in which he lived, who has done more for civilizing and humanizing the world, than any author who ever wrote; who has written more forcibly and effectually on the rights of man and in support of the religion of Jesus, than perhaps any divine however celebrated. What says he? He says that if a person be in danger of life, or losing a limb, or a member, especially one of the highest consequence, and it be even doubtful if he can survive the loss, and there be no probability of avoiding it, the criminal person may be lawfully and *instantly* slain.

We then come to Judge Foster, one of the ablest judges that ever sat on a British bench; he tells you, that the injured party may repel force with force, in defence of his person, habitation, or property, against one who manifestly endeavours, with violence and surprise, to commit a known felony upon either: in these cases, he is not obliged to

retreat, but may pursue his adversary, till he find himself out of danger; and if in the conflict he happen to kill, such killing is in justifiable self-defence.

You have the same doctrine laid down by Lord Hale, who was one of the best and most humane of judges, as well as one of the most devout Christians that ever appeared. Both he and Hawkins support the same doctrine; and in Hawkins it is further said, if the party assaulted cannot conveniently and safely retreat, and if he kill the assailant to avoid this beating, it is justifiable homicide. This is the law from those writers.

The next is Blackstone, whose doctrines have never been controverted. He tells you, that the party assaulted must flee, as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or enormous bodily harm, and then in his defence he may kill his assailant. He does not put it on the question of life being in danger, but says, that where a man is in danger of any enormous bodily harm, he is not to wait till the case has happened, but has a right to kill his assailant. This forms the law of justifiable homicide, and is the doctrine of universal justice, as well as of our municipal law.

Thus, gentlemen, I have shown from the books the principles that govern in relation to justifiable homicide. I will now read one or two cases which more perfectly establish this doctrine, and show what is the nature of the assault, that justifies the assaulted in taking the life of the assailant.

In Mawgridge's case, who upon words of anger between him and a Mr. Cope, threw a bottle with great violence at the head of the latter, and immediately drew his sword, on which Mr. Cope returned a bottle with equal violence, Lord Holt says, it was lawful for Mr. Cope so to do, for he who hath shown that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand; and he adds, it was reasonable for Mr. Cope to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life.

It appears to me that this case justifies him who shall kill, where a weapon is used which would endanger his life, though it have not the effect; and that the person assaulted has a right to attempt the destruction of the assailant, that he himself might not be destroyed. You there have the particular case. This case will depend on the law of excusable homicide. It therefore is not necessary to have recourse to such as are so strong as that I have read. The law says, that if there be reasonable ground to suspect that life is in danger, a man shall be excused, if he exercise the right nature has given him to destroy and take away the life of him, by whom his own has been endangered.

As to Nailor's case, I do not mean to contradict it, any further than it is contradicted by the doctrine I state. You recollect, gentlemen, that it was a case, where a son, in consequence of hearing a scuffle between his father and brother rose from his bed, threw his brother on the ground, fell upon him and beat him; that while in this situation, he was undermost, not being able to escape or avoid the blows he received, he gave his brother a mortal wound with a penknife. This was ruled to be manslaughter, because the prisoner was, in the first place, in the wrong, as much so as any man can be who offends against the law of society and of nature by fighting with his father; and further because he was not necessitated from the attack of his brother, which brother was without any weapon in his hand, to have recourse to such violent means for defence; because also he was in a wrong act, and then made use of a mischievous weapon. For, says the book, from the manner in which he was attacked, there was no reason to believe his life ever was in danger. But had he been attacked with a dangerous weapon, then he would have been clear of crime. The law will not countenance a man in destroying his assailant, unless there be a reasonable ground to believe that his life or person is in imminent danger; and whether it be so or not, may be determined from the circumstance of the weapon, whether it appeared to be such a one, with which life might be destroyed.

On this appearance of intent and reasonable ground of apprehension that life was in danger, was determined the case of the servant, who coming up found his master robbed and slain, and instantly killed the murderer. Although not attacked himself, yet on account of the apprehension which it was supposed he might be under of being attacked, and his own life put in danger, it was held, excusable homicide.—This is the principle on which some writers defend the authority given by the law of destroying the robber who demands your purse; because the same man who comes to rob, would, if necessary for his purpose, take your life.

Further, if an officer, going to arrest a man in a civil suit, break into a house, which he is not justifiable in doing, and the person within kill him, knowing him to be a bailiff, it is manslaughter; but, adds the authority, if he had not known him to be a civil officer, the breaking in would have afforded a reasonable ground of suspicion that it was done with a felonious intent, and of course excusable homicide.

There was another case read to you which it is important perhaps to notice. It is that of the officer who entered the chamber of a gentleman who was in bed, on which he sprang out of bed, seized a sword, and ran the officer through the body. This was

determined to be manslaughter. Because he did not use sufficient caution, and because the officer had no weapon in his hand, for had there been any, that circumstance might have led the gentleman to think there was a felonious intent in entering his room, and then it would have been excusable homicide.

It will be important, gentlemen of the jury, for you to keep these doctrines in your minds when you come to consider this case on the evidence. It will be incumbent on you to further recollect the decision of Mawgridge's case as to excusable homicide, as distinguished from manslaughter. If I recollect aright, the true criterion between homicide in chance medley upon self-defence and manslaughter is, where both parties are actually fighting at the time when the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer had not begun to fight, or having begun had endeavoured to decline any further struggle, and afterwards, being closely pressed by his adversary, kill him, to avoid his own destruction, this is homicide excusable in his own defence. Manslaughter therefore on a sudden provocation, differs from excusable homicide *se defendendo* in this, that in the one there is an apparent necessity, for self-preservation, to kill the aggressor; in the other there is no necessity at all, being only a sudden act of revenge, and then it is manslaughter,

This distinction I wish you, gentlemen, to keep in your minds when you come to examine this particular case.

Having stated the law as I conceive it to be, as, on reflection, it will be found to be supported by the books which have been read, and as it will, I presume, be given to you by the court,—I now come to state the facts, for it is my duty only to state the facts as they have appeared in evidence, without arguing upon them.—In doing this, although I do not mean to go into a critical examination of the testimony you have heard from some of the witnesses, nor in the least to question their veracity, yet there is a fitness and propriety that some of them should be laid out of the way. I mean Mr. Lane. And though I have not the slightest intention of impeaching his character, yet it is manifest from the whole current of the testimony delivered, that Mr. Pickman must have been right, and Mr. Lane, as well as the other witnesses who were examined in support of his evidence, mistaken. Because Mr. Lane says that the transactions he testified to, were on the brick pavement, when all the other witnesses, as well as Mr. Pickman who was with him, say the scene was in the middle of the street. I shall say no more on this point. It would be wasting time to suppose you can attach the least weight to the testimony of Mr. Lane. On that of Mr. Howe, I have only to beg you will compare it with that of the other witnesses; because, as the first time he saw the parties together, was when they were on the brick pavement, he could not have seen the first blow and the earlier parts of the transaction; he could not have witnessed all those ingredients, which go to enable you to make a just conclusion from the whole; he could not have seen those circumstances which took place before the firing.

On the previous circumstances which have been detailed to you, I mean the misunderstandings that have taken place between the defendant and Mr. Benjamin Austin, the father of the deceased, it is not necessary to say much. I shall merely ask you to consider the statement made to you by the witnesses examined. It is from them only that I wish you to judge of the serious provocation received.—You have the testimony of Messrs. Babcock, Scott, and Russell, as to expressions used by Mr. Austin, and the manner in which they were delivered. It is by putting yourselves in the situation in which these witnesses stood, that you must examine the force of Mr. Austin's expressions. Mr. Scott so perfectly understood the meaning of Mr. Austin, that he went to Mr. Selfridge to communicate it; and permit me to say, that whatever took place at that time, if from the general apprehension of yourselves, you think it was applicable to Mr. Selfridge, you will believe and suppose it to be true, that Mr. Austin meant to charge Mr. Selfridge with being the damned federal lawyer, who had solicited the action; and in a court of law it cannot but be believed it was as high a charge as could be made; it amounted to a criminal offence, for it was that he went about stirring up and soliciting suits. You saw Mr. Scott on the examination stand, and have to decide whether he did, or could believe it was Mr. Selfridge that was meant. The story from Mr. Austin is that he had contradicted the report to the very persons to whom he mentioned it. Mr. Scott says that he never did; Mr. Russell, who also heard the imputation, and knew, it appears, how it was intended to be applied, says that Mr. Austin never did contradict that fact. The conduct then of the defendant in demanding a written recantation from Mr. Austin must appear, I trust, to have been perfectly justifiable and warranted from the general charge against him. He did not persist in his demand of reparation more pertinaciously than what in duty to himself and family he was bound to do. He asked only for the means of proving that Mr. Austin himself had acquitted him from the charge he had made against him, as he found Mr. Austin would not do it himself. This satisfaction was refused. You have it in evidence that he never received any thing like a satisfaction, which a man of honour in his profession, or as a man of any decent standing in society could be satisfied

with. For, there is not the smallest evidence that there was a contradiction of the report, but only an evasion. Mr. Austin did not contradict the charge that he had made; he merely said that he had not used the name of Mr. Selfridge; this too, was not done by way of disavowal to the man himself to whom he had said it; and was, from the very manner, rather a confirmation than denial. Having thus acknowledged that he had not used the name of Mr. Selfridge, Mr. Austin satisfies his conscience that he had made every amends. Can any honourable man say that he had, when Mr. Russell and Mr. Scott say that he never had contradicted it to them? When asked, "Did you contradict it to Mr. Babcock?" he in the first place says that he heard it from Mr. Babcock, and that this was after the suit was brought. I shall not enlarge on this point; I refer you to the evidence for Mr. Austin's behaviour. His own testimony is against him. Can you then have any doubt that Mr. Selfridge persisted more than he ought to have done in requiring Mr. Austin to contradict in writing what he had circulated; because, said Mr. Selfridge, I find that when you say you have contradicted the assertion in person, these very people to whom you say you have done it, declare it has not been done. Was it then honourable in Mr. Austin to refuse giving to the defendant a written acknowledgment, that the report was without foundation? I put it to you, gentlemen, if you had stated to various persons, from misinformation, that which bore hard on the character of any one, and you were asked to give a note in writing that you were misinformed, would either of you have refused that small and honest avowal? No; I know you too well to think it; for I know that no honourable man could or would refuse it. For where I have undesignedly done an injury, by spreading a false report of another, would I not fly to retract it, that I might make reparation as much as I could, and even put it in his power to show that he was right and I in error? Examine whether there was, throughout the whole, a desire in the defendant for Mr. Austin to do anything more than to enable him to have this retraction, that it might be in his power to use it for his own justification. He says, in his conversation with Mr. Welch, that his only motive in moving in the affair, was to rescue his professional conduct from imputation. That he could not relinquish this pursuit; but before he adopted other measures, he would leave Mr. Austin a day or two to reflect. Was this the language of a man who sought revenge? No, it was that of a calm and mild expostulation, asking redress for an injury sustained. I shall say no more on this part of the testimony, than to observe, it rests with you; if you give credit to Mr. Austin, you must believe Mr. Welch tells a falsehood; you must believe that Eager Russell and Scott, all tell falsehoods, or are most strangely, not to say grossly mistaken. You cannot, I say, believe the relation of Mr. Austin, unless you believe that all these persons are mistaken.—I now come to the motives and to the conduct of the defendant on this unhappy day. If you are of opinion that there was no felonious intent on the part of Mr. Selfridge, at that time, then you cannot find him guilty of manslaughter, because manslaughter must be committed with a felonious intent. If there were no felony in his mind, no crime in his heart, he must be decided by your verdict to be an innocent man.—I wish now to trace the conduct of Mr. Selfridge on that day:—You find there had been a suit prosecuted by him, in which he was by the desire of Captain Ingraham to sue out an execution, and to deliver it to him on 'change. Captain Ingraham is positive that he told the defendant on Saturday or Sunday evening, to get the execution; and that he himself went twice to the exchange for the purpose of receiving it from Mr. Selfridge. You have therefore the very reason why the defendant went there; when in the common practice of his profession, it would be natural to go on the exchange in the general course of business; but here is a particular piece of business to meet a person by appointment; there can therefore be no doubt, that he went there for that purpose, and for that only.

In the conversation with Mr. Richardson, the defendant said, he could not confine himself; that his business was of a peculiar nature, and that he must go about it as usual. Perhaps he recollected at the time, that he was to go out on special business, and that was the reason why he spoke to Mr. Richardson as he did. When this took place with Mr. Richardson, he had no idea of the affray which afterwards happened. It is hardly possible, if he had entertained the smallest intention of provoking a quarrel, that he should not have mentioned it in conversation to Mr. Welch and Mr. Richardson, persons who were his intimate professional acquaintances. After Mr. Selfridge left his office, you find him walking on exchange, in as calm and deliberate a manner as ever he did in his life; and if any of you, gentlemen, have ever observed Mr. Selfridge walk, you must recollect that he does hold his hands in walking, exactly as the witnesses have described; for it is the natural position of a man who would wish to aid the debility of his body; and the manner in which Mr. Selfridge is stated to have walked, gives the exact description of the walk of a weak and feeble man.—From the testimony offered, you will further find, and particularly by the evidence of Brooks, (for I wish to trace the defendant down to the Exchange) that he is clear Mr. Selfridge's hands were behind him, and not in his pocket. Mr. Brooks stood at Clark's shop, and observed Selfridge from the

moment of his entering State Street. He must therefore have seen the position of his arms best. Some of the witnesses suppose that his hands were in his pocket; this was a mistake that might easily arise from not having a full view of his body. It would be difficult in some kinds of coats which have the pockets behind, to ascertain whether the hands were actually in them or not; but Brooks who saw him pass first in the front, and then in the rear, must be the best qualified to determine what was the actual situation of the defendant's hands. Irwin tells you that his hands were behind him; that in this position he came down the street, but that when Austin came out from the side walk, Mr. Selfridge held up his left hand, as if to guard his head, took his right hand from behind him, put it into his pocket, drew out a pistol, extended his arm, and fired.—Take this with the testimony of French, Bailey, and Shaw, who received from the defendant the execution he sued out at the request of Mr. Ingraham, and the current of evidence from other witnesses; for on these facts it is, that you have to determine, and if you must judge from the weight of evidence, and decide according to the number of witnesses, you can have no doubt that the defendant, instead of going to meet an affray, was going down to the Exchange on special business, with his hands behind him, and walking very deliberately, when he was assaulted by young Austin. To further prove that he could not have gone to seek this insult, you will please to recollect that he went with his face looking towards the Branch Bank, and not towards the place where the deceased was. When in this situation, judge you whether a man with, as you are told, the sun in his eyes, and his hat flipped or slouched over them, could have seen Mr. Austin, who stood with his back against Mr. Townsend's shop. It is manifest that Mr. Selfridge could not, from the course he was taking, have looked that way, and it is in evidence that he did not bear towards Mr. Townsend's shop, till obliged, from the violence of young Austin's attack, to turn to defend himself. Some say that he stepped back, others, that he turned around to do this.

It would seem that, when the defendant had got a little to the southward of the middle of the street, the unfortunate young man rushed out and made an attack upon him. Let us, for the purpose of ascertaining this, now compare the testimony. Lewis Glover states to you, that he went into State street that day for the express purpose of seeing what would take place, supposing there would be an affray between Mr. Selfridge and some other person, in consequence of the publication in the Gazette. He says he took a station where he had a full view of the defendant, as he came down the street; that he walked very deliberately, with his hands behind him; that Austin went from the pavement with a quick pace, directly against Selfridge, with his cane uplifted, and gave the defendant one violent blow, and as he was giving the second, Selfridge fired. If you believe this, there was, before the discharge of the pistol, as violent a blow given as could be struck by an athletic young man, directly on the defendant's head. This witness's credit stands totally unimpeached, even if alone; but is it not corroborated? Mr. Edwards also was in expectation of some affray, and stopped before Mr. Townsend's shop. He saw Mr. Selfridge walking in a direction that would have brought him on the brick pavement near the Branch Bank, when a person brushed by him, and got near the middle of the street, with a stick in his hand; he adds, that it was uplifted, but whether in the attitude of giving or receiving a blow, he could not say; but that the cane descended, and the pistol was fired at the same instant. You have it, however, in evidence, that just before, something caught the eye of Mr. Edwards, and he turned his head to Mr. French. Does not this interval afford time for the first blow deposed to by Glover? Were there no other testimony but that delivered by these two witnesses, would not this of Edwards be the strongest corroboration of that of Glover? Would you not, on giving a due credit to both, say that his evidence is confirmed by the statement of Edwards? Consider the situation of the parties;—Selfridge coming down the street, pursuing a course that would have taken him to the left of Austin, towards the Branch Bank—as soon as Austin perceived him, he changed his stick from the left to the right hand, and brushed by every one with a quick pace. Consider the distance between him and Selfridge, the few paces that intervened; that Mr. Austin was running on the defendant, as you have been told, as if he was going to attack a wild beast; that he sprang from the pavement and rushed on him, when it was not possible for Mr. Selfridge, whose hat was over his eyes, and when his hands were behind him, to guard himself before a blow could have been given. The circumstances of the case render the testimony of Glover so connected, as not to leave you a possibility of doubting it, and unless what is testified be contradicted, you cannot reject it; but if it be of such a nature that it can be reconciled with, and is supported by circumstances and other evidence, you cannot but believe it. See how this is established more and more by every comparison. Wiggin says that he was in State street also, for the purpose of seeing anything that might take place; that he was conversing about young Austin and Selfridge; that he saw Mr. Austin with a stick in his hand, and Selfridge coming down the street, that he looked round for Austin after having seen Mr. Sel-

fridge, and while his eye was thus momentarily directed, he heard a blow. Can you account for this, and the other blow which followed, unless there was one given before the pistol was fired? Mr. Wiggin could not have been deceived, when all his attention was awake for the purpose of observation; and he saw, when the pistol was fired, the hand descending again. There is a corroboration as strong as possible, of this fact, that a blow was given before the discharge of the pistol, from the testimony of Bailey and French. They tell you the assault was as violent as possible, and that they could not tell which was first, the blow or the firing of the pistol. Now, if their eyes were turned aside but for an instant, there can be no doubt but that this evidence is true, and that they did not see the whole of the transaction. From some of the testimony, it appears, that in wounds of this kind, the strength is very great, and the muscular action quicker and more sudden. Do not these circumstances go to corroborate the statement of Mr. Glover, and to account for the instantaneous act of the blow, and discharge of the pistol?

It is but fair to draw this conclusion, that, when witnesses testify positively to a fact, which other persons might not have seen, but which is neither contradicted by, nor contradicts the testimony given by others, to believe that what was seen by some of the witnesses, might have escaped the observation of the others. Because, if you do this, you give credit to each party, without supposing either to have sworn falsely.

I now come to the testimony of Mr. Fales. I mean not by any means to discredit him. I believe him to be an honourable young man; nor has anything that has taken place caused me to doubt it. I, however, do believe, that when a transaction is recent and fresh, the impressions are stronger than at a future day. I need not contend for a proposition like this. There is no reason to suppose that he could *then* tell what was untrue. He relates that there was some conversation between young Austin and himself about the cane, from which you will draw your own conclusions. It appears, however, that he had some apprehensions about his friend's having this cane, for he asked young Austin to give it him, and he states that, when at Townsend's shop, the deceased brushed by him, and went towards Mr. Selfridge. He further tells you, and tells you very candidly, that he cannot tell which was first, the blow, or the firing of the pistol.

When you see the sensibility of this young gentleman, who could not but be agitated on the occasion, when he was deceived and deluded by his friend, who had told him he was not on this errand, could he be unruffled, calm, and unagitated? Surely not, for even at our time of life, when the nerves are hardened—when we are not so liable to be agitated as a young man like Mr. Fales, should we see a person spring forward to do that which we should so earnestly wish he was not going to do, would we not feel agitated and alarmed? Had he any motive on earth not to declare the actual fact? Had he any occasion to prevaricate? None. Would you, Gentlemen of the Jury, or would you not, believe what he said at that time? Can you think he did not then feel every disposition to speak in favour of his friend, who lay bleeding and dead on the spot he had left? He must have had every feeling alive to the memory of his friend, and would have been happy to raise it, in the estimation of those he addressed. It is but natural that he should. But it is not in nature that he should wish to say anything against him. How then can you account for the answer? It was the undisguised voice of truth at a moment when she could be the least concealed, in answer to a distinct and positive question. It is on *that* answer that I would rely, and it is on that that you will, I trust, also rely. Look to the further declarations of Mr. Fales on this unhappy occasion. In the course of the evening, when Mr. Benjamin Austin must have felt all that resentment which a parent may be supposed to feel against the man who had taken the life of his son; when he could not wish to hear his child deemed the aggressor; when Mr. Fales could not have wished to plant a dagger in a father's bosom; when he must have gone to the house of Mr. Austin with far different intentions; when he went to administer balm and consolation to an aged and afflicted parent; when it might, without impeaching the character of Mr. Fales, be well supposed, he wished to hide the truth, but truth must be told. What was it that he then answered to a father's question? "Your son struck a blow first—a violent blow, before the pistol was fired." Had Mr. Fales the least motive on earth to represent his friend's conduct as influenced by the spirit of a bravado, or to give that colour to the transaction? Mr. Nichols went and made a memorandum of the words. You therefore have this fact fully in evidence. There was, then, every motive but that of truth, to tell a different story. From the representations made by the friend of the deceased at the very hour of his death; from his answer to an inquiring and afflicted parent, you have the testimony of Glover most fully and completely corroborated. There must necessarily have been one violent blow first, and on the second blow descending, the pistol was fired. Thus then stands the evidence of this important fact; you have to it, the positive testimony of Glover, corroborated by that of Edwards, and of Wiggin, by a circumstance as strong, as if he had seen the blow, for he heard it. You have it corroborated, not only by the first declarations of Mr. Fales, but from probability arising from the manner in which he delivered his testimony while on the stand.

This then was the situation of the defendant, he was going down State street, not only on his just and ordinary business, but on a special agreement to meet a client there for a particular purpose. True, he had notice that some person was to be hired to destroy or attack him. It may have been said that he could have gone to a magistrate and obtained the protection of the laws of his country, and have taken security for keeping the peace. I agree that this would have been a fair answer to the question of, what could he do? If Mr. Cabot had said, young Austin is to attack you; speaking as I do in a court of justice, it was, under such a circumstance, his duty to have done so. But it was not so said to him, it was merely mentioned to him that some person was to be hired or employed to destroy or beat him. He had it not then in his power to avail himself of the protection of the law by taking security; for he did not know by whom he was to be assailed. It became then, as the laws of his country could not afford him protection, a duty in him to protect his own life by all the means in his power. The particular purpose for which he had the pistol in his pocket I know not. What it was is not fully in evidence. But the plain fact is this, that the defendant, with a pistol in his pocket, was going down to the exchange on business, and was met by a man coming upon him like a person attacking a wild beast; a blow was struck on his head which would have fractured his skull had it not been for the hat which he had on. What did nature, what did law and reason prompt him to do on such an occasion? Was it not to make use of every means in his power to defend himself? Let me here ask what were these means? You have heard accounts of his debilitated state, his total want of muscular strength. He could not have defended himself by his hands; he could not have got out of the way, for he was unable to fly. You have it in evidence that Austin was on the run; he could not have even turned round without receiving two or three blows, perhaps fatal ones. What then could he do? that only which he could do in defence of his life. The only remaining thing he had to do, was what he was compelled to do. He took his pistol from his pocket, and, after having received one blow, killed, as he was receiving another, the assailant who would have killed him. This is the defence we make to the charge against Mr. Selfridge. This we contend to be the legal and proper one of justifiable homicide to preserve his own life. If this be unwarrantable, our defence is gone. But if nature, if reason, if instinct impel every created being, when attacked, to make use of all the means in his power to defend his life and person, you cannot adjudge this to have been unlawful in the defendant, without reducing every one that is assailed by a ruffian to this dreadful alternative, of perishing by the hand of violence, or by the verdict of a jury. After this was done Mr. Selfridge defended himself by holding up his hands. Some say he struck; I must say, that from the testimony, it appears to me he did not. But allowing that he did, it was natural that he should do so. He threw his pistol, it is true, but whether at the deceased or not does not appear. The person says it was thrown at his head, and Howe tells us it rolled towards Mr. Russell's printing office.

The conflict over, no violence was seen on the part of Mr. Selfridge. Nothing barbarous, nothing even like anger or rage. He went forward as if exhausted, and leaned against Mr. Townsend's shop. Some cried out, who is the rascal that has killed him? "I," said the defendant, "am the man. I mean not to go away. I know what I have done, and am ready to answer for it to the laws of my country." Mr. Melville came up to him and said, "You ought not to go away." "I do not intend to," was still the answer. When other persons, seeing a crowd assembled, and violence talked of, advised him to retire, he went off, sending for the officers of justice, that he might be ready to answer to the laws of his country, if he had offended against them. He desired Mr. Bourne to let Bell be informed where he was to be found. This was the conduct not of guilt, but of conscious innocence. It is attempted to be done away by saying, that he was to have dined with Mr. Bell; but could any man, especially a lawyer, after an act of this sort, have imagined that he might take his dinner, without interruption, in a public house?—There can be no doubt, therefore, that he told where he was to be found by the sheriff of the county. True, he went away, but not to fly. It was in that awful moment, as in this, that he appealed from the passions of the people to their judgment, from their imaginations to their reason, from their feelings to their sense of justice, from their violence to his country. You, gentlemen of the jury, are that country.—It is not possible to conceive any motive to do this act, but what arose from necessity, imposed at the very instant. It is hardly in evidence, that Mr. Selfridge knew this unfortunate young man.

If there be any feelings of revenge to gratify, would he have gone on the Exchange to indulge them? No, he would have sought some other opportunity. And what was his behaviour there? He was tranquil and calm.—Look at his after conduct. It was not the result of hardness of heart, but of that conscious innocence which protects the man unpolluted with sin, when every friend flies from him; which in the hour of terror and dismay, whispers comfort and consolation to his soul; for the heart which knows no crime, can be tormented with no remorse.—This, gentlemen, is, I believe, the whole of our story. I am not permitted, by the rules of the court, to go into argument on the facts. I have

barely stated the law; not what are my notions of it, but from the books. I took especial care not to state the case before the witnesses were examined. For it was not my wish to exaggerate or diminish. I meant to place it on the ground of the evidence itself, and to leave, without any appeal to the passions, your minds open to receive the fair impressions from testimony I have attempted to recapitulate. Having said nothing but what they testified, I have done all the duty which in this state of the case, I am at liberty to perform. I therefore leave the defendant with you, barely stating my own conviction, as a lawyer, a Christian, and a man, that he has committed no offence, either against the law of society, of religion, or of nature. That he has not against the law of society, I bottom myself on the authorities which have been read. That he has not against the laws of religion, I infer from the duty which every created being owes to Him, who in his beneficence brought us into existence, to defend life, by all means in his power. Not against the law of nature, for whatever theorists, or speculative men may say to the contrary, yet, when the alternative arises, whether a man must fall, or whether it must be he who assaults him; whether he must sacrifice all his duties to God, to religion, and to society, or put to death the man by whom he is assailed, nature would assert her prerogative, the aggressor must die, and the innocent man remain alive.

Mr. Dexter.—May it please your honour, and you, gentlemen of the jury.—It is my duty to submit to your consideration some observations in the close of the defence of this important and interesting cause. In doing it, though I feel perfectly satisfied that you are men of pure minds, yet I reflect with anxiety, that no exertion or zeal on the part of the defendant's counsel can possibly insure justice, unless you likewise perform your duty. Do not suppose that I mean to suggest the least suspicion with respect to your principles or motives. I know you to have been selected in a manner most likely to obtain impartial justice; and doubtless you have honestly resolved, and endeavoured to lay aside all opinions which you may have entertained previous to this trial. But the difficulty of doing this is not perhaps fully estimated; a man deceives himself oftener than he misleads others; and he does injustice from his errors, when his principles are all on the side of rectitude. To exhort him to overcome his prejudices, is like telling a blind man to see. He may be disposed to overcome them, and yet be unable, because they are unknown to himself. When prejudice is once known, it is no longer prejudice, it becomes corruption; but so long as it is not known, the possessor cherishes it without guilt; he feels indignation for vice, and pays homage to virtue; and yet does injustice. It is the apprehension that you may thus mistake—that you may call your prejudices principles, and believe them such, and that their effects may appear to you the fruits of virtue; which leads us so anxiously to repeat the request, that you would examine your hearts, and ascertain that you do not come here with partial minds. In ordinary cases there is no reason for this precaution. Jurors are so appointed by the institutions of our country, as to place them out of the reach of improper influence on common occasions; at least as much so as frail humanity will permit.

But when a cause has been a long time the subject of party discussion—when every man among us belongs to one party or the other, or at least is so considered—when the Democratic presses throughout the country have teemed with publications, fraught with appeals to the passions, and bitter invectives against the defendant;—when on one side everything has been done that party rage could do, to prejudice this cause; and on the other, little has been said in vindication of the supposed offender; though on one occasion I admit that too much has been said; when silence has been opposed to clamour, and patient waiting for a trial to systematic labour to prevent justice;—when the friends of the accused, restrained by respect for the laws, have kept silence, because it was the exclusive right of a court of justice to speak,—when no voice has been heard from the walls of the defendant's prison, but a request that he may not be condemned without a trial; the necessary consequence must be, that opinion will progress one way—that the stream of incessant exertion will wear a channel in the public mind; and the current may be strong enough to carry away those who may be jurors, though they know not how or when they received the impulse that hurries them forward.

I am fortunate enough not to know, with respect to most of you, to what political party you belong. Are you republican federalists? I ask you to forget it; leave all your political opinions behind you; for it would be more mischievous, that you should acquit the defendant from the influence of these, than that an innocent man, by mistake should be convicted. In the latter case, his would be the misfortune, and to him would it be confined; but in the other, you violate a principle, and the consequence may be ruin. Consider what would be the effect of an impression on the public mind, that in consequence of party opinion and feelings, the defendant was acquitted. Would there still be recourse to the laws, and to the justice of the country? Would the passions of the citizens, in a moment of frenzy, be calmed by looking forward to the decision of courts of law for justice? Rather every individual would become the avenger of imaginary transgressions—violence would be repaid with violence; havoc would produce

havoc; and instead of a peaceable recurrence to the tribunals of justice, the spectre of civil discord would be seen stalking through our streets, scattering desolation, misery, and crime.

Such may be the consequences of indulging political prejudice on this day; and if so, you are amenable to your country and your God. This I say to you who are federalists; and have I not as much right to speak thus to those who are democratic republicans? That liberty which you cherish with so much ardour, depends on your preserving yourselves impartial in a court of justice. It is proved by the history of man, at least of civil society, that the moment the judicial power becomes corrupt, liberty expires. What is liberty but the enjoyment of your rights free from outrage or danger? And what security have you for these, but an impartial administration of justice? Life, liberty, reputation, property, and domestic happiness, are all under its peculiar protection. It is the judicial power, uncorrupted, that brings to the dwelling of every citizen all the blessings of civil society, and makes it dear to man. Little has the private citizen to do with the other branches of government. What to him are the great and splendid events that aggrandize a few eminent men, and make a figure in history? His domestic happiness is not less real because it will not be recorded for posterity: but this happiness is his no longer than courts of justice protect it. It is true, injuries cannot always be prevented; but while the fountains of justice are pure, the sufferer is sure of a recompense.

Contemplate the immediate horrors and final despotism that must result from mutual deeds of vengeance, when there is no longer an impartial judiciary, to which contending parties may appeal, with full confidence that principles will be respected. Fearful must be the interval of anarchy; fierce the alternate pangs of rage and terror; till one party shall destroy the other, and a gloomy despotism terminate the struggles of conflicting factions. Again, I beseech you to abjure your prejudices. In the language once addressed from Heaven to the Hebrew prophet, "Put off your shoes, for the ground on which you stand is holy." You are the professed friends, the devoted worshippers of civil liberty; will you violate her sanctuary? Will you profane her temple of justice? Will you commit sacrilege while you kneel at her altar?

I will now proceed to state the nature of the charge on which you are to decide, and of the defence which we oppose to it; then examine the evidence to ascertain the facts, and then inquire what is the law applicable to those facts.

The charge is for manslaughter; but it has been stated in the opening, that it may be necessary to know something of each species of homicide, in order to obtain a correct idea of that which you are now to consider.

Homicide, as a general term, includes, in law, every mode of killing a human being. The highest and most atrocious is murder; the discriminating feature of which is previous malice.—With that the defendant is not charged; the Grand Jury did not think that by the evidence submitted to them, they were authorized to accuse him of that enormous crime. They have therefore charged him with manslaughter only.

The very definition of this crime excludes previous malice; therefore it is settled, that there cannot, with respect to this offence, be an accessory before the fact; because the intention of committing it is first conceived at the moment of the offence, and executed in the heat of a sudden passion, or it happens without any such intent, in doing some unlawful act. It will not be contended that the defendant is guilty of either of these descriptions of manslaughter. Neither party suggests that the defendant was under any peculiar impulse of passion at the moment, and had not time to reflect; on the contrary, he is said to have been too cool and deliberate. The case in which it is important to inquire, whether the act was done in the heat of blood, is where the indictment is for murder, and the intent of the defence is to reduce the crime from murder to manslaughter; but Selfridge is not charged with murder. There is nothing in the evidence that has the least tendency to prove an accidental killing, while doing some unlawful act. It is difficult to say, from this view of manslaughter, when compared with the evidence, on what legal ground the defendant can be convicted; unless it be, that he is to be considered as proved guilty of a crime which might have been charged as murder, and by law, if he now stood before you under an indictment for murder, you might find him guilty of manslaughter, and therefore you may now convict him.

This does not appear to be true; for the evidence would not apply to reduce the offence from murder to manslaughter, on either of the aforementioned grounds. Perhaps it may be said that every greater includes the less, and therefore, manslaughter is included in murder; and that it is on this principle, that a conviction for manslaughter may take place on an indictment for murder. I will not detain you to examine this, for it is not doing justice to the defendant to admit, for a moment, even for the sake of argument, that the evidence proves murder. Our time will be more usefully employed in considering the principles of the defence. Let it be admitted then, as stated by the counsel for government, that, the killing being proved, it is incumbent on the defend-

ant to discharge himself from guilt. Our defence is simply this, that the killing was necessary in self-defence; or, in other words, that the defendant was in such imminent danger of being killed, or suffering other enormous bodily harm, that he had no reasonable prospect of escaping, but by killing the assailant.

This is the principle of the defence stripped of all technical language. It is not important to state the difference between justifiable and excusable homicide, or to show to which the evidence will apply; because, by our law, either being proved, the defendant is entitled to a general acquittal.

Let us now recur to the evidence, and see whether this defence be not clearly established.

[Mr. Dexter then went into a minute examination of the whole evidence, which is here omitted, because it was necessarily very long, and the evidence itself is all before the public. In the course of it he laboured to prove, that Mr. Selfridge went on the exchange about his lawful business, and without any design of engaging in an affray; that he was in the practice of carrying pistols, and that it was uncertain whether he took the weapon in his pocket in consequence of expecting an attack; that if he did, he had a right so to do, provided he made no unlawful use of it; that the attack was so violent, and with so dangerous a weapon, that he was in imminent danger; that it was so sudden, and himself so feeble, that retreat would have been attended with extreme hazard; that the pistol was not discharged until it was certain that none would interfere for his relief, and that blows, which perhaps might kill him, and probably would fracture his skull, were inevitable in any other way, and that the previous quarrel with the father of the deceased, if it could be considered as affecting the cause, arose from the misbehaviour of old Mr. Austin, and that the defendant had been greatly injured in that affair.]

Mr. Dexter then proceeded as follows:—

It cannot be necessary, gentlemen, for the defendant to satisfy you beyond doubt, that he received a blow before the discharge of the pistol. There is positive evidence from one witness, that the fact was so, and other witnesses say much that renders it probable. But if the defendant waited until the cane was descending, or even uplifted within reach of him, reason and common sense say, it is the same thing: no man is bound to wait until he is killed, and being knocked down would disable him for defence. The killing can be justified only on the ground that it was necessary to prevent an injury that was feared; not that it was to punish for one that was past. This would be revenge, and not self-defence.

The same law authorities which tell you that a man must retreat as far as he can, say also, that if the assault be so violent, that he cannot retreat without imminent danger, he is excused from so doing. If this means anything, it is applicable to our case; for perhaps you can hardly imagine a more violent or more sudden assault. When to this is added the muscular debility of the defendant, it certainly forms a very strong case. He could neither fight nor fly. Had he attempted the latter, he must have been overtaken by his more athletic and active antagonist, and either knocked down, or maimed, or murdered, as the passions of that antagonist might dictate.

But it is said, and some passages from law books are read to prove it, that the necessity which excuses killing a man, must not be produced by the party killing; and that he must be without fault. You are then told that the defendant sought the affray, and armed himself for it, and that he had been faulty in calling Mr. Austin, the father, opprobrious names in the newspaper.

As to the affray being sought by the defendant, there is no evidence to support such an assertion, but what arises from his conversation with Mr. Richardson and Mr. Whittman, or from the fact of his having a pistol in his pocket. These only prove that he was prepared to defend himself, if attacked; and if he did defend himself lawfully, this is the best evidence to show what was his intention; it cannot be presumed that he took the pistol with an unlawful intent, when he never expressed such intent, and when his subsequent conduct was lawful. He had been informed that he should be attacked by a bully; in such case what was his duty? Was he bound to shut himself up in his own house? Was he bound to hire a guard? If he had done so, this would have been urged as the strongest evidence of his intention to commit an affray. Could he obtain surety of the peace from a future assailant, whose name was unknown to him? Or was he bound to go about his business, constitutionally feeble and unarmed, at the peril of his life? There would be more colour for this suggestion, if the defendant had gone on the exchange, and there insulted either old Mr. Austin or his son, or voluntarily engaged in altercation with either of them. But he went peaceably about his ordinary business, and made use of his weapon only when an unavoidable necessity happened. A man when about to travel a road infested with robbers, lawfully arms himself with pistols; if he should be attacked by a robber, and from necessity kill him, is he to be charged with having sought this necessity, because he voluntarily undertook the journey, knowing the danger that attended it, and took weapons to defend himself

against it? As little is the defendant to be censured for going about his ordinary business, when he knew that it would be attended with danger, and arming himself for defence in case such an emergency should happen, as that the law could not afford him protection. I have here supposed that the pistol was taken for the purpose for which it was used; this, however, is far from being certain from the evidence, as it is in proof that the defendant had daily occasion for pistols in passing between Boston and Medford, a road that has been thought attended with some danger of robbery; and that he sometimes carried pistols in his pocket. There is not the least pretence for saying, that he expected an affray with young Mr. Austin. He could not presume that his father would employ him, and it is not probable that he knew him in the confusion that the sudden attack must have produced. As to the publication in the newspaper against old Mr. Austin, though this might be in some sense a fault, yet it is far from being within the principle established by the books. When it is said the party must be without fault, it is evident that nothing more is meant, than that he must be without fault in that particular transaction. If we are to leave this and look back, where are we to stop? Are we to go through the life of the party to examine his conduct? If the defendant had libelled Mr. Austin, that was a previous and distinct offence, for which he was, and yet is, liable to an action or an indictment; and unless it be presumed without evidence and against all probability, that it was intended to produce this affray, it can have no connexion with the principle stated. There is another obvious motive for it, and there is nothing in the evidence tending to convince you that it was intended to provoke an attack; the defendant had been defamed; retaliation was the natural punishment; and there is no reason to presume that anything more was intended, unless it was to blunt the shafts of calumny from Mr. Austin, by destroying his credit and standing in society. It is true, that it is said by several respectable compilers of law, that the party killing must be without fault; but they all refer to one adjudged case, which is found stated in 1 Hale's P. C. page 440. By recurring to the statement of this case, it appears, that the persons who killed, and would have excused it on the ground of necessary self-defence, had forcibly entered and disseized the rightful owner of a house, and continued forcibly to detain it against him; in an attempt by the owner forcibly to recover possession, those who held wrongfully were reduced to the necessity of killing; and it was holden, that as they were then engaged in an unlawful act, namely, forcibly detaining the house against him who had a right to enter, they had produced this necessity by their own wrongful conduct, and therefore it should not excuse them. So that this principle seems to be related to another, and in reality to be involved in it; I mean the well known principle that he who kills another by accident, while performing an unlawful act, is guilty of manslaughter. It would be absurd, that a man who kills by accident, while performing an unlawful act, should be guilty of manslaughter; and yet that he who kills from design, while performing an unlawful act, however necessary it may have become, should be guiltless. It is settled that if on a sudden affray, A. make an assault on B., and afterwards the assaulter be driven to the wall, so that he can retreat no farther, and then kill B. necessarily in his own defence, that is excusable homicide in A.; and yet here, A. was in fault in this very affray, by making the first assault; but having afterwards retreated as far as he could, the law extends to him the right of self-defence. This shows that unless at the moment of killing, the party be doing wrong, the principle contended for on the other side does not apply. In proof of this I will also read to you an authority from 1 Hale's P. C. 479. "There is malice between A. and B.; they meet casually, A. assaults B. and drives him to the wall; B. in his own defence kills A. This is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large; for it was not a killing on the former malice, but upon a necessity imposed upon him by the assault of A.

"A. assaults B., and B. presently thereupon strikes A. without flight, whereof A. dies; this is manslaughter in B., and not *se defendendo*. But if B. strikes A. again, but not mortally, and blows pass between them, and at length B. retires to the wall, and being pressed upon by A. gives him a mortal wound, whereof A. dies, this is only homicide *se defendendo*, although that B. had given divers other strokes that were not mortal before he retired to the wall, or as far as he could. But now suppose that A. by malice makes a sudden assault upon B., who strikes again, and pursuing hard upon A., A. retreats to the wall, and in saving his own life, kills B. Some have held this to be murder, and not *se defendendo*, because A. gave the first assault, Crompton, fol. 22, b. grounding upon the book of 3 Edw. 3, Itin., North Coron. 287; but Mr. Dalton, *ubi supra*, thinketh it to be *se defendendo*, though A. made the first assault either with or without malice, and then retreated."

I am bound in candour to add, that the law, as above laid down, on the authority of Dalton, has since been doubted as to that part of it which supposes previous malice. This passage has been reviewed by Hawkins and East in their several treatises on crown law, and I have chosen to read it from this very circumstance, because it appears that it

has been well considered; and when subsequent and eminent writers, on full examination reject a part, and admit the residue to be law, it is strong confirmation of that residue. It is that alone on which I rely, and it is amply sufficient to prove what I have before stated; that if A. first assault B. on a sudden affray without malice, A. may still excuse killing B. from a subsequent necessity in his own defence; and yet none will deny that first assaulting B., though without malice, was a fault. On this point, I submit to your consideration one further remark. The publication in the newspaper is nothing more than provoking language; now if the defendant had immediately before the affray, made use of the same language to old Mr. Austin, no lawyer will pretend that this would have been such a fault as would have precluded the defendant from excusing himself for the subsequent necessary killing on the principle of self-defence. If it were so, we should find it so stated in books of authority that treat on this subject; for the case must often have happened, as provoking language generally precedes blows. On the contrary, we find it settled, that even making the first assault does not deprive the party of this defence. It would be absurd then to say, that rude and offensive language, which cannot even justify an assault, should produce this effect. It can hardly be necessary to add, that, if these words, spoken at the moment, would not have deprived the defendant of this defence, having published them before, in a newspaper, cannot produce this consequence. I have hitherto admitted that the publication in the newspaper was a fault in the defendant; nor am I disposed entirely to justify it; yet circumstances existed which went far to extenuate it. He had been defamed on a subject, the delicacy of which, perhaps, will not be understood by you, as you are not lawyers, without some explanation. Exciting persons to bring suits is an infamous offence, for which a lawyer is liable to indictment; and to be turned away from the bar. It is so fatal to the reputation of a lawyer, that it is wounding him in the nicest point to charge him with it. It is the point of honour; and charging him with barratry, or stirring up suits, is like calling a soldier a coward. Mr. Austin, the father, had accused the defendant publicly, of this offence, respecting a transaction in which his conduct had been punctiliously correct; the defendant first applied to him in person, and with good temper, to retract the charge; afterwards in conversations with Mr. Welch, Mr. Austin acknowledged the accusation to be false, and promised to contradict it as publicly as he had made it; yet he neglected to do it; again he said he had done it, but the fact appeared to be otherwise. This induced the defendant to demand a denial of it in writing; though Mr. Austin privately acknowledged he had injured Mr. Selfridge, yet he refused to make him an adequate recompense, when he neglected to make the denial as public as the charge. This was a state of war between them upon this subject, in which the more the defendant annoyed his enemy, the less power he had to hurt him. It was therefore a species of self-defence; and Mr. Austin, who had first been guilty of defamation, perhaps had little cause to complain. To try the correctness of this, we will imagine an extreme case.

Suppose a man should have established his reputation as a common slanderer and calumniator, by libelling the most virtuous and eminent characters of his country, from Washington and Adams, down through the whole list of American patriots; suppose such a one to have stood for twenty years in the kennel, and thrown mud at every well dressed passenger; suppose him to have published libels till his style of defamation has become as notorious as his face, would not every one say, that such conduct was some excuse for bespattering him in turn? I do not apply this to any individual; but it is a strong case to try a principle; and if such conduct would amount almost to a justification of him who should retaliate, will not the slander of Mr. Austin against Mr. Selfridge, furnish some excuse for him? It has also been stated to you, gentlemen, and some books have been read to prove it, that a man cannot be justified or excused in killing another in his own defence, unless a felony were attempted or intended. Some confusion seems to have been produced by this, which I will attempt to dissipate. It has been settled that if a felony be attempted, the party injured may kill the offender, without retreating as far as he safely can; but, that if the offence intended, be not a felony, he cannot excuse the killing in his own defence, unless he so retreat, provided circumstances will permit. On this principle, all the books that have been read to this point, may easily be reconciled. But the position contended for by the opposing counsel, is in direct contradiction to one authority which they themselves have read. In the fourth volume of Blackstone's Commentaries, page 185, the law is laid down as follows: "The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence, he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law." Also in 1 Hawkins' Pleas of the Crown, chap. 29, sect. 13, the law on this point is stated thus: "And now I am to consider homicide *se defendendo*,

which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempt be made upon him in his own house) kills the person by whom he is reduced to such an inevitable necessity." From these two highly respectable authorities, it appears that, though nothing more be attempted than to do great bodily injury, or even to beat a man, and there be no possibility of avoiding it, but by killing the assailant, it is excusable so to do. When the weight and strength of the cane, or rather cudgel, which the deceased selected, is considered, and the violence with which it was used, can it be doubted that great bodily harm would have been the consequence if Selfridge had not defended himself? The difference between this weapon and the pistol made use of by the defendant, perhaps, is greatly exaggerated by the imagination. The danger from the former might be nearly as great as from the latter: when a pistol is discharged at a man in a moment of confusion and agitation, it is very uncertain whether it will take effect at all; and if it should, the chances are perhaps four to one, that the wound will not be mortal. Still further, when the pistol is once discharged, it is of little or no use; but with a cane, a man within reach of his object, can hardly miss him, and if the first blow should prove ineffectual, he can repeat his strokes until he has destroyed his enemy.

If it were intended to excite contempt for the laws of the country, a more effectual method could hardly be taken, than to tell a man, who has a soul within him, that if one attempts to rob him of a ten dollar bill, this is a felony; and therefore esteemed by the law an injury of so aggravated a nature, that he may lawfully kill the aggressor; but that, if the same man should whip and kick him on the public exchange, this is only a trespass, to which he is bound to submit rather than put in jeopardy the life of the assailant; and the laws will recompense him in damages.

Imagine that you read in a Washington newspaper, that on a certain day, immediately on the rising of Congress, Mr. A. of Virginia, called Mr. B. of Massachusetts, a scoundrel, for voting against his resolution; and proceeded deliberately to cut off his ears. Mr. B. was armed with a good sword cane, but observed, that his duty as a citizen forbade him to endanger the life of Mr. A., for that cutting off a man's ears was by law no felony; and he had read in law books that courts of justice were the only proper "vindices injuriarum," and that he doubted not, that by means of a law suit, he should obtain a reasonable compensation for his ears. What are the emotions excited in your breasts, at this supposed indignity and exemplary patience of the representative of your country? Would you bow to him with profound respect on his return? Or rather, would not his dignity and usefulness, by universal consent, be lost forever?—We have now taken a view of the facts, and the positive rules of law that apply to them; and it is submitted to you with great confidence, that the defendant has brought himself within the strictest rules, and completely substantiated his defence, by showing that he was under a terrible necessity of doing the act; and that by law he is excused. It must have occurred to you, however, in the course of this investigation, that our law has not been abundant in its provisions for protecting a man from gross insult and disgrace. Indeed it was hardly to be expected, that the sturdy hunters, who laid the foundations of the common law, would be very refined in their notions. There is in truth much intrinsic difficulty in legislating on this subject. Laws must be made to operate equally on all members of the community; and such is the difference in the situations and feelings of men, that no general rule, on this subject, can properly apply to all. That, which is an irreparable injury to one man, and which he would feel himself bound to repel even by the instantaneous death of the aggressor, or by his own, would be a very trivial misfortune to another. There are men, in every civilized community, whose happiness and usefulness would be forever destroyed by a beating, which another member of the same community would voluntarily receive for a five dollar bill. Were the laws to authorize a man of elevated mind, and refined feelings of honour to defend himself from indignity by the death of the aggressor, they must at the same time furnish an excuse to the meanest chimney sweeper in the country for punishing his sooty companion, who should fillip him on the cheek, by instantly thrusting his scraper into his belly. But it is too much to conclude, from this difficulty in stating exceptions to the general rule, that extreme cases do not furnish them. It is vain, and worse than vain, to prescribe laws to a community, which will require a dereliction of all dignity of character, and subject the most elevated to outrages from the most vile. If such laws did exist, the best that could be hoped, would be, that they would be broken. Extreme cases are in their nature exceptions to all rules; and when a good citizen says, that, the law not having specified them, he must have a right to use his own best discretion on the subject; he only treats the law of his country in the same manner in which every Christian necessarily treats the precepts of his religion. The law of his master is "re-ist not evil." "If a man smite thee on the one cheek turn to him the other also." No exceptions to these rules are stated; yet does not every rational Christian necessarily make them? I have been led to make these observations, not because I think

them necessary in the defence of Mr. Selfridge; but because I will have no voluntary agency in degrading the spirit of my country. The greatest of all public calamities, would be a pusillanimous spirit, that would tamely surrender personal dignity to every invader. The opposing counsel have read to you, from books of acknowledged authority, that the right of self-defence was not given by the law of civil society, and that that law cannot take it away. It is founded then on the law of nature, which is of higher authority than any human institution. This law enjoins us to be useful, in proportion to our capacities; to protect the powers of being useful, by all means that nature has given us, and to secure our own happiness, as well as that of others. These sacred precepts cannot be obeyed without securing to ourselves the respect of others. Surely, I need not say to you, that the man who is daily beaten on the public exchange, cannot retain his standing in society, by recurring to the laws. Recovering daily damages will rather aggravate the contempt that the community will heap upon him; nor need I say, that when a man has patiently suffered one beating, he has almost insured a repetition of the insult.—It is a most serious calamity, for a man of high qualifications for usefulness, and delicate sense of honour, to be driven to such a crisis, yet should it become inevitable, he is bound to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God. Whatever may be the consequences, he is bound to bear them, to stand like mount Atlas,

“ When storms and tempests thunder on its brow,
And oceans break their billows at his feet.”

Do not believe that I am inculcating opinions, tending to disturb the peace of society? On the contrary, they are the only principles that can preserve it. It is more dangerous for the laws to give security to a man, disposed to commit outrages on the persons of his fellow citizens, than to authorize those, who must otherwise meet irreparable injury, to defend themselves at every hazard. Men of eminent talents and virtues, on whose exertions, in perilous times, the honour and happiness of their country must depend, will always be liable to be degraded by every daring miscreant, if they cannot defend themselves from personal insult and outrage. Men of this description must always feel, that to submit to degradation and dishonour is impossible. Nor is this feeling confined to men of that eminent grade. We have thousands in our country who possess this spirit; and without them we should soon deservedly cease to exist as an independent nation. I respect the laws of my country, and revere the precepts of our holy religion; I should shudder at shedding human blood; I would practise moderation and forbearance, to avoid so terrible a calamity; yet, should I ever be driven to that impassable point, where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honour.

It has been intimated, that the principles of Christianity condemn the defendant. If he is to be tried by this law, he certainly has a right to avail himself of one of its fundamental principles. I call on you then to do to him as, in similar circumstances, you would expect others to do to you: change situations for a moment, and ask yourselves, what you would have done, if attacked as he was. And instead of being necessitated to act at the moment, and without reflection, take time to deliberate. Permit me to state, for you, your train of thought. You would say this man, who attacks me, appears young, athletic, active and violent. I am feeble and incapable of resisting him; he has a heavy cane, which is undoubtedly a strong one, as he had leisure to select it for the purpose: he may intend to kill me; he may, from the violence of his passion, destroy me, without intending it; he may maim or greatly injure me; by beating me he must disgrace me. This alone destroys all my prospects, all my happiness, and all my usefulness. Where shall I fly, when thus rendered contemptible? Shall I go abroad? every one will point at me the finger of scorn. Shall I go home? my children—I have taught them to shrink from dishonour; will they call me father? What is life to me, after suffering this outrage? Why should I endure this accumulated wretchedness, which is worse than death, rather than put in hazard the life of my enemy?—Ask yourselves whether you would not make use of any weapon that might be within your power to repel the injury; and if it should happen to be a pistol, might you not with sincere feelings of piety, call on the Father of Mercies to direct the stroke.—While we reverence the precepts of Christianity, let us not make them void by impracticable construction. They cannot be set in opposition to the law of our nature; they are a second edition of that law; they both proceed from the same author.—Gentlemen, all that is dear to the defendant, in his future life, is by the law of his country placed in your power. He cheerfully leaves it there. Hitherto he has suffered all that his duty as a good citizen required, with fortitude and patience; and if more be yet in store for him, he will exhibit to his accusers an example of patient submission to the laws. Yet permit me to say in concluding his defence, that he feels full confidence that your verdict will terminate his sufferings.

PARKER, J., charged the jury as follows:—

Gentlemen of the jury!—As this most interesting trial has already occupied four days—And as you must by this time be nearly exhausted, I shall endeavour, in discharging the duty incumbent on me, to consume as little more of your time as may be consistent with a clear exposition of the principles necessary to be understood, in order to form a just and legal decision. You have heard the important facts in the case, minutely and distinctly stated by the witnesses, ably and ingeniously commented upon by counsel, and the principles of law elaborately discussed and illustrated in as forcible and eloquent arguments as were ever witnessed in any court of justice in our country. It is now left to you upon the whole view of the case, both of the law as it shall be declared to you by the court, and the facts as proved by the testimony, to pronounce a verdict between the defendant and your country.—That in so important a trial, it should have devolved upon me, alone, to preside over its forms, as well as to declare the principles upon which your decision is to rest, is by no means a subject of congratulation. It is a situation which of all others I should have avoided, had not official duty imperiously imposed it upon me. But the organization of the court, and distribution of the services of its members are such as to have rendered any other arrangement difficult, if not impossible. Under our present judiciary establishment, all criminal causes, other than capital, are triable before one judge; and this system has proved itself to be eminently calculated for the despatch of public business; other provisions in the system ensure as great a degree of correctness as can be expected of any human institution.—It is true that although at a term holden by one judge, if others are present, they may proceed together; but at this time, the court being in session in three, if not four several counties, it was impracticable, had it been desirable, to have more than two judges engaged in the present trial. The great delay which would have taken place, in consequence of a division of opinion (a case not unlikely to happen in the course of any trial) between two judges, rendered it altogether inexpedient that more than one should attend; and as this term had been previously assigned to me, the unpleasant task of officiating in the present case, seemed unavoidably to belong to me.

Since it has thus fallen to me to execute a painful and anxious duty, I shall not shrink from the task of declaring to you the principles of law by which you are to be governed in your investigation and decision of this case. If in doing this, I should be found capable, in order to retain the favour of one class of the community, or to court that of another, of abusing my office by stating that to be law which I know to be otherwise; this is the last time I should be suffered to sit upon this bench, and I ought to meet the execration and contempt of the society to which I belong.—The crime charged by the grand jury upon the defendant is manslaughter; a crime of high consideration in the eye of the law. This crime, however, is not defined by our statute, but its punishment is by it provided for.—In order, therefore, to ascertain the nature and character of the crime, it is necessary to resort to the books of the common law, the principles of which, by the constitution of our government, are made the law of our land, until they shall be changed or repealed, by our own legislature.—The counsel for the government, as well as for the defendant, have therefore wisely and properly searched the most approved authorities of the common law, for the principles upon which the prosecution or the defence must be supported. It is from those books alone, that any clear ideas of the offence which is in trial, or the defence which has been set up, can be attained.—The crime of manslaughter, according to those authorities, consists in the unlawful and wilful killing of a reasonable being, without malice, express or implied, and without any justification or excuse.—That the killing of a human being, under some circumstances, is not only excusable, but justifiable, is proved by the very terms of this definition.—Some persons, however, have affected to entertain the visionary notion, that it is in no instance lawful to destroy the life of another, grounding their opinion upon the general proposition in the Mosaic code, that "Whosoever sheddeth man's blood, by man shall his blood be shed." There is always danger in taking general propositions as the rules of faith or action, without attending to those exceptions, which if not expressly declared, necessarily grow out of the subject matter of the proposition.—Were the position above alluded to, true, in the extent contended for by some; then the judge who sit in the trial of a capital offence, the jury who may convict, the magistrate who shall order execution, and the sheriff who shall execute, will all fall within this general denunciation, as by their instrumentality the blood of man has been shed.—The same observations may be applied to one of the precepts in the decalogue. Thou shalt not kill, is the mandate of God himself. Should this be construed literally and strictly, then a man who, attacked by a robber, or in defence of the chastity of his wife, or of his habitation from the midnight invader, should kill the assailant, would offend against the divine command, and be obnoxious to punishment. But the common understanding of mankind will readily perceive that the very nature of man, and principle of self-preservation, will supply exceptions to these general denunciations.

Our laws like those of all other civilized countries, abundantly negative such unequal

fied definitions of crime, and have adopted certain principles by which the same act may be ascertained to be more or less criminal or entirely innocent, according to the motive and intent of the party committing it.—Thus when the killing is the effect of particular malice or general depravity, it is murder, and punished with death.—When without malice, but caused by sudden passion and heat of blood, it is manslaughter.—When in defence of life it is excusable.—When in advancement of public justice, in obedience to the laws of the government, it is justifiable.—These principles are all sanctioned by law and morality, and yet they all contradict the dogma, that “whosoever sheddeth man’s blood, by man shall his blood be shed.”—It is not necessary for you to run a nice distinction between justifiable and excusable homicide; if the one now in trial be either the one or the other, it is sufficient for the purpose of the defendant.—A distinction existed in England, which does not exist here; there the man who had committed an excusable homicide forfeited his goods and chattels; while he who had a justification forfeited nothing. Here, whether the homicide be justifiable or excusable, there must be an entire acquittal.—Numerous authorities, ancient and modern, have been read to you upon this subject. Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrassments, there being in some instances an apparent though in none a real incongruity. But I apprehend you need not trouble yourselves with the books out of court, for I think I shall be able to state all the principles you will have occasion to consider; there being in fact no disagreement about them from the time of Sir Edward Coke, one of the earliest sages of the law, down to Sir William Blackstone, one of its brightest ornaments. These same principles, although taken from English books, have been immemorially discussed, and practised upon by our lawyers, adopted and enforced by our courts and juries, and recognised by our legislature. To prove this, I now need say no more, than that the same learned judge Trowbridge, who was quoted by the Attorney General, in his charge to the jury in the trial of the soldiers for the massacre in 1770, laid down, discussed and illustrated with great precision and clearness, every principle which can come in question in the present trial.—These principles I will endeavour to simplify for your consideration.

First.—A man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm; may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life, or prevent the intended harm—such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.

Secondly.—When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

Thirdly.—When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Of these three propositions, the last is the only one which will be contested anywhere; and this will not be doubted by any who is conversant in the principles of criminal law. Indeed, if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case. A. in the peaceable pursuit of his affairs, sees B. rushing rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough, in the same attitude, A. who has a club in his hand, strikes B. over the head before, or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine, must require, that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol is loaded. A doctrine which would entirely take away the essential right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle. These are the principles of law, gentlemen, to which I call your attention. Having done this, I might leave the cause with you, were it not necessary to take a brief view of some other parts of it. As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere, with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the

province of a judge, into that of an advocate. All which I conceive necessary or proper for me to do, in this part of the cause, is to call your attention to the points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and the law can be clearly discriminated; I should always wish the jury not to leave the stand without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced, to weigh the testimony, and settle the merits of the case. An important rule in the present trial is, that on a charge for murder or manslaughter, the killing being confessed or proved, the law presumes that the crime, as charged in the indictment, has been committed, unless it should appear by the evidence for the prosecutor, or be shown by the defendant on trial, that the killing was under such circumstances as entitle him to justification or excuse. On the point of killing, there is no doubt in this case. The young man named in the indictment, unquestionably came to his death by means of the discharge of a pistol by the defendant at the bar. This part is confessed as well as proved. The great question in the case is, whether according to the facts shown to you on the part of the prosecution, or by the defendant, any reasonable, legal justification or excuse has been proved.—Whether the killing were malicious or not, is no farther a subject of inquiry than that if you have evidence of malice, although the crime charged does not imply malice, it may be considered as proving this crime, because it effectually disproves the only defence which can be set up, after a killing is established.

From the testimony of several witnesses examined by the Solicitor and Attorney Generals, it appears that on the day set forth in the indictment, the defendant was in his office a little before one o'clock—that in a conversation about his quarrel with the father of the deceased, he intimated that he had been informed an attack upon him was intended, and that he was prepared.—That a short time afterwards, he went down from his office, which is in the Old State House, crossing State-street diagonally, tending towards the United States Bank. That as he passed down his hands were behind him, outside of his coat, without any thing in them, is proved by the testimony of Mr. Brooks, who saw him pass down, and by that of young Mr. Erving, who saw him when the deceased approached, put his right hand in his pocket, and take out his pistol, while his left arm was raised to protect his head from an impending blow. The manner of his going down upon 'change, the weapon which he had with him, the previous intimation of an attack which he seems to have received, from Mr. Cabot or Mr. Welch, and the errand upon which he went down as stated by Mr. Ingraham, are all circumstances worthy of your deliberate attention. Passing down State street as before described, several witnesses testify that the deceased, who was standing with a cane in his hand, near the corner of the Suffolk buildings; having cast his eye upon the defendant, shifted his cane into his right hand, stepped quick from the side walk on to the pavement, advanced upon the defendant, with his arm uplifted; that the defendant turned, stepped one foot back, and that a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterwards given and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who becoming exhausted, fell down, and in a few minutes expired. This is the general course of the testimony; the scene was a shocking one, and all the witnesses state to you that they were exceedingly agitated. This will account for the relation given by Mr. Lane and one other witness, I believe Mr. Howe, who state the facts so differently from all the other witnesses produced by government as well as by defendant, that however honest we may think them, it is impossible not to suppose they are mistaken.—Indeed, the Attorney General has wisely and candidly laid their testimony, so far as it differs from that of the other witnesses, out of the case. There is one witness, Mr. Glover, who states the transactions somewhat differently from the other witnesses. He says, that having expected to see a quarrel upon Exchange, in consequence of the publication against the deceased's father, in the morning, he went there for the express purpose of seeing what should pass—that he saw Mr. Selfridge coming down street, saw young Austin advance upon him, that he had a full view of both parties, was within fifteen feet of them, that he saw a blow fall upon the head of Selfridge with violence, the arm of the deceased raised to give a second blow, which fell the instant the pistol was discharged. This is the only witness who swears to a blow before the discharge of the pistol; but he swears positively, and says he has a clear, distinct recollection of the fact; his character is left without impeachment. If you consider it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances proved by other witnesses, which may corroborate or weaken the testimony of Mr. Glover. On this point you will attend to

the testimony of Mr. Wiggin, who swears that he heard a blow as if on the clothes of some person, that he turned, and saw the deceased's arm uplifted, and another blow and the discharge of the pistol were together. You will consider the testimony of young Erving, who swears that the left arm of the defendant was over his forehead, as though defending himself from blows, when he saw the blow fall. You will consider that all the witnesses but Glover, state that the blow which they saw, and thought the first, was a long blow across the head, that the blow which Glover says was the first, was a direct perpendicular blow, and that he then saw the second blow, which was a cross one, as testified by the other witnesses. If you find a difficulty in settling the fact of the priority of the blow, take this for your rule, that a witness who swears positively to the existence of a fact, if of good character, and sufficient intelligence, may be believed, although twenty witnesses of equally good character, swear that they were present, and did not see the same fact. The confusion and horror of the scene was such, that it was easy for the best and most intelligent of men to be mistaken as to the order of blows, which followed each other in such rapid succession, that the eye could scarcely discern an interval. You will, therefore, compare the testimony of the witnesses, where it appears to vary, attending to their different situation, power of seeing, and capacity of recollecting and relating, and settle this fact according to your best judgment, never believing a witness who swears positively, to be perjured, unless you are irresistibly driven to such a conclusion. Upon this point you will also attend to the testimony of Mr. Fales, and of Mr. Osborne, and Mr. Perkins Nichols, touching the testimony of Mr. Fales. The counsel for the defendant seem, however, to deem it of little importance to ascertain whether the blow was given before the pistol was discharged or not, as there is evidence from all the witnesses that an *assault*, at least, was made by the deceased, before the pistol was fired. I think differently from them upon this point. When the defence is, that the assault was so violent and fierce that the defendant could not retreat, but was obliged to kill the deceased to save himself, it surely is of importance to ascertain whether the violent blow he received on his forehead, which at the same time that it would put him off his guard, would satisfy him of the design of the assailant, was struck before he fired or not. I doubt whether self-defence could in any case be set up, where the killing happened in consequence of an assault only, unless the assault be made with a weapon which if used at all, would probably produce death. When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defence. But whether the firing of the pistol was before or after a blow struck by the deceased, there is another point of more importance for you to settle, and about which you must make up your minds, from all the circumstances proved in the case; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigour of the defendant, and his power to resist or to fly. The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the real stress of the case. If you believe under all the circumstances, the defendant could have escaped his adversary's vengeance at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted. If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him, as will deprive him of the privilege of setting up a defence of this nature. It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honour and natural right, by which the killing may be justified. These are principles which you as jurors, and I as a judge, cannot recognise. The laws which we are sworn to administer are not founded upon them. Let those who choose such principles for their guidance, erect a court for the trial of points and principles of honour; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom, ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power—he has been guilty of manslaughter, notwithstanding you may believe with the grand jury who found the bill, that the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

I ought not to rest here; for although I have stated to you that when a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may from the existence of other circumstances proved against him, forfeit his right to a defence which

the laws of God and man would otherwise have given them.—If a man, for the purpose of bringing another into a quarrel, provoke him so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger kill his adversary, he would be guilty of manslaughter, if not of murder, because the necessity being of his own creating, shall not operate in his excuse.—You are therefore to inquire whether this assault upon the defendant by the deceased, was or was not by the procurement of the defendant; if it was, he cannot avail himself of the defence, now set up by him. And here you are called upon to distinguish pretty nicely, and to attend to a part of the case which I thought was going too far back to have an influence upon this trial, but which the urgency of the Attorney General and the consent of defendant's counsel finally induced me to admit.—You have heard the whole story of the misunderstanding between the defendant and the father of the deceased—who was originally in the wrong, it is not for me to say, but I feel constrained to say, that whatever provocation the defendant may have conceived to have been given him, and however great the injury which the deceased's father may have done him, he certainly proceeded a step too far in making the publication which appeared in the paper which came out on the morning of this unhappy disaster.—To call a man coward, liar and scoundrel, in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever. Such a publication is libellous in its very nature, as it necessarily excites to revenge and ill blood. Indeed, I believe a court of honour, if such existed, to settle disputes of this nature, would not justify such a proclamation as the one alluded to. A posting upon 'change or in some public place, we have heard of, but I never before saw such a violent denunciation as this in a public newspaper.—Neither can I refrain from censuring the managers of the paper who admitted such a publication, for so readily receiving and publishing, what in its very nature would tend to disturb the public peace. But, gentlemen, it is one thing for a man to have done wrong, and another thing for that wrong to be of a nature to justify an attack upon his person. If personal wrong, done by the father of the deceased to the defendant, would not justify him in publishing a libel; neither would the libel have justified the deceased or his father in attacking the person of the author of the libel.—No man can take vengeance into his own hands, he can use violence only in defence of his person. No words, however aggravating, no libel, however scandalous, will authorize the suffering party to revenge himself by blows.—If therefore, Mr. Austin himself, the object of the newspaper publication, would not be justified had he attacked the defendant and beat him with a cane; still less would the circumstances have justified the unfortunate young man, who fell a victim to this most unhappy and ever to be lamented dispute. For however a young and ardent son may find advocates in every generous breast, for espousing his father's quarrel, from motives of filial affection, and just family pride; yet the same laws which govern the other parts of the case, would have pronounced him guilty, had he lived to answer for the attack which was the cause of his death.

The laws allow a son to aid his father if beaten, and to protect him from a threatened felony, or personal mischief, and in like cases a father may assist a son, and should a killing in either case take place it is excusable; but neither one nor the other can justify resorting to force, to avenge an injury consisting in words however opprobrious, or writings however defamatory.—You will therefore consider, whether these facts, antecedent to the meeting on 'change, can have much operation in the cause, let which party will, be found by you to be in the wrong.—Upon the whole, therefore, of these circumstances, should you be of opinion that the defendant, in order to avenge himself upon the father of the deceased, prepared himself with the deadly weapon which he afterwards used, went upon 'change with a view to meet his adversary, and expose himself to an attack, in order that he might take advantage of and kill him, intending to resort to no other means of defence in case he should be overpowered; there is no doubt the killing amounted to manslaughter—but if from the evidence in the case, you should believe that the defendant had no other view but to defend his life and person from an attack which he expected, without knowing from whom it was to come—that he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise, than by the death of the assailant—then the killing was excusable, provided the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent. Of all this you are to judge and determine, having regard to the testimony of the several witnesses who have given evidence to these several points in the defence.—The principles which I have thus stated are recognised by all the books which have been read, and are founded in the natural and civil rights, and in the social duties of man.—The last subject on which I shall trouble you, is the address which has been so forcibly urged upon your minds by the counsel on one side, and as zealously and ably commented on by the Attorney General on the other, touching the necessity of excluding all prejudices and prepossessions relative to this cause. I do not apprehend these observations were in

any degree necessary, as I cannot bring my mind to fear that the verdict of twelve upright, intelligent jurors, selected by lot from the mass of their fellow-citizens, will be founded on any thing beside the law and evidence applicable to the case.—Every person of this numerous assembly, let his own opinion of the merits of the cause be as it may, must be satisfied of the fairness, regularity, and impartiality of the trial, up to the present period; and sure I am, that nothing which is left to be done by you, will impair the general character of the trial. If you discharge your duty conscientiously, as I have no doubt you will, whether your verdict be popular or unpopular, you may defy the censure, as I know you would disregard the applause of the surrounding multitude.

Least of all do I apprehend that party spirit will come in, to influence your opinions. However the storms of party rage may beat *without* these walls, I do not believe the time has yet come when they shall find their way *within*. Nor do I believe that a general apprehension is entertained, that a man accused of a crime is to be saved or destroyed, according to the political notions he entertains. If ever the time should come, that a general belief shall be entertained that trials are conducted and judgments given with a view to the political character of the parties interested, vain and ineffectual will be the forms of your constitution, and useless the attempts to administer the laws. A general resistance would be the consequence, and if this belief should be founded in fact and in truth, that resistance would, in my apprehension, be perfectly justifiable; for no people would be bound to respect the *forms* of justice when the substance shall have vanished; when the fountains of justice shall be manifestly corrupt, and the forms and parade adhered to for the purpose of imposing on the citizens, and subjecting them to oppression under the garb of law.

You, gentlemen, will not be the first to violate the solemn oath you have taken, and seek for a conviction or an acquittal of the defendant upon any other principles than those which that oath has sanctioned. And as I trust, that in performing my duty, I have conscientiously regarded that oath which obliges me “faithfully and impartially to administer the laws according to my best skill and judgment,” so that in discharging yours, you will have due regard to that which imposes upon you the obligation well and truly to try the cause between the commonwealth and the defendant, according to law and the evidence which has been given you.

Verdict, not guilty.

PHILADELPHIA RIOT CASES—1844.

CHARGE OF KING, PRESIDENT, TO THE GRAND JURY,

FOR SEPTEMBER TERM, 1844.

Gentlemen of the Grand Jury:—Important as are the ordinary duties imposed upon the grand jury of a tribunal possessing exclusive and unlimited criminal jurisdiction, in this great and populous district; they will be found seriously and solemnly enhanced, by the course of official inquiries, consequent upon recent outrages, which have filled the community with consternation and alarm. This once peaceful and law-loving people, have witnessed the open assault of lawless violence on public order; and the blood of our citizens shed in support and opposition to the public law has crimsoned our highways. Our city during these scenes of violence has exhibited the appearance of a town of war, instead of the pacific seat of science and literature, of commerce and the industrial arts. The timid have trembled for the safety of person and property; and even bo'der spirits have for a moment hesitated in the opinion, whether some fault did not exist in the vital organism of a social system, the workings of which displayed such terrifying irregularities. All these consequences seem to have flowed from unauthorized multitudes assuming upon themselves the authority to redress supposed wrongs, and punish supposed offenders. May the mournful lessons of the past, deeply impress all with the certain truth, that neither peace, safety nor security can prevail in any community except under the guarantees of law and order; and that the first and greatest duty which every citizen owes to his country, is a reverential regard for these sacred and holy elements of true civil liberty.

If the common law was really wanting in adequate means for the prevention of a crime fraught with such results, and for punishing it when committed, it might justly be reproached for inefficiency. Such, however, is not the truth. If on any occasion, the peaceable and law-loving have suffered from outbreaks, the fault will be found to have arisen rather from misconception of the extent of its preventive powers, than their want of adequate stringency. I cannot but think that absence of proper information on this

subject both in the citizens generally, and the officers especially charged with the conservation of the public peace, as to the duty of the one and the authorities of the other, on emergencies such as we have recently witnessed, has done much to produce results deeply disparaging to the character of this community, the great body of which yield to none in respect and veneration for law and its peaceful and uninterrupted exercise. I state this, not by way of reproach or censure, but as the simple enunciation of a fact.—The present seems a favourable occasion for the court to express its opinion on these interesting topics, which although it cannot remedy the past, may not be without its wholesome effect on the future.—Accordingly we propose instructing you as to what constitutes an unlawful, what a riotous, and what a treasonable assembly; and to explain the authorities possessed by sheriffs, justices of the peace and private citizens, for the suppression of such assemblies, and the arrest and detention of such offenders; and what is the protection given by law to its ministers acting for the advancement of public justice in such suppression, arrest and detention.—Any tumultuous disturbance of the public peace by three persons or more, having no avowed or ostensible, legal or constitutional object, assembled under such circumstances, and deporting themselves in such a manner, as to produce danger to the public peace and tranquillity, and which excites terror, alarm, and consternation, in the neighbourhood, is an unlawful assembly.—Every tumultuous disturbance of the public peace by three or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some private object, and afterwards executing the same in a violent and turbulent manner to the terror of the people, whether the act intended is lawful or unlawful, is a riot.—It is not necessary that any person, in order to bring himself into the perilous position of a rioter, should be a chief actor in the scene of outrage. The common law, founded on the teachings of centuries, holds that if any person, seeing others actually engaged in the riots, joins himself to them, and assists therein, he is as much a rioter as if he had first assembled with them for that purpose; inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprise. And it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot was in truth one of the first assembly, or had a previous knowledge of their design. Every person who encourages, or promotes and takes part in the riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, is himself to be considered such—for, in this crime, all concerned are principals.

One of the chief causes of danger in popular tumults, such as we have just passed through, arises from the congregating, at the scene of outrage, of multitudes of persons professing to be influenced by mere motives of curiosity. It is a notorious fact, that in all the great riots that have, in this country and elsewhere, disturbed the communities in which they have occurred, and prostrated the laws, the actual mischief is done by comparatively few, the strength of the meeting being composed of individuals who seem to be passing spectators. I say *seem*—for although in many instances they are so, yet frequently these same passive spectators really are in cordial union of feeling with the more reckless spirits, who do the work of destruction, but, from cunning and caution, abstain from apparent participation in their atrocities. This class of reasoning rioters are quite conscious that their presence and quiet sympathy embolden the active partisans, by imparting that confidence always derived from numbers, while it alarms, hinders, and embarrasses the officers of justice in their efforts to restore public order. No really well disposed citizen should remain at such a scene, unless engaged in aid of the public authorities. Were all such either to stay away or depart, there would be less difficulty in dealing with the avowed offenders. The dread of injuring the innocent would not then paralyze the ministers of justice, and the supporters and opponents of law would be arrayed in unequivocal battalia.

In adopting this proper course, such persons avoid placing themselves in a position, from which they may find difficulty in extricating themselves. For, in riotous and tumultuous assemblies, all who are present and not actually assistant in their suppression, in the first instance are, in presumption of law, participants; and the obligation is cast upon a person so circumstanced, in his defence to prove his actual non-interference.—When, however, the sheriff of a county, the mayor of a city, or any other known public conservator of the peace, has repaired, in the discharge of his duty, to the scene of tumult, and there commanded the dispersion of the unlawful or riotous assembly, and demanded the assistance of those present to aid in its suppression, from that instant there can be no neutrals. The line is then drawn between those who are for, and those who are against the maintenance of order, and with the forces of the one or the other, all who see fit to remain, must promptly arrange themselves. Those who continue looking on while the active rioters are resisting the public authorities, and daringly moving on to the consummation of their designs of destruction—who refuse to join with the authorities, and witness their defeat without striking one blow in aid of outraged law, are just as

much rioters as those most active in the work of violence; and in such circumstances it will avail them nothing that they appear only passive lookers on, instead of active rioters and incendiaries. The idea intended to be conveyed by the court may be exemplified by an actual occurrence during the riots of May last. On that occasion, after the rioters had satiated themselves with destruction in Kensington, they proceeded to the city, and collected in front of St. Augustine Church, threatening its destruction. The worthy and excellent chief magistrate of the city, placing himself at the head of a police force, repaired to the scene of violence. The keys of the church were delivered to him by that part of the congregation who previously had them in charge, and the church was left in the immediate custody of the law; no attempt or effort being made to otherwise defend it. The mayor, seeing no disposition in the multitude to retire, addressed them, urging and commanding them to depart in peace, and soliciting all good citizens to unite with him in accomplishing this so much to be desired object. What followed? Not only was he received with insults and imprecations, but actually assaulted, his officers forcibly driven off, and the church which had been given up to his protection and that of the law, was set fire to and consumed, amid felonious and incendiary shouts. While this work of outrage was transacting in the heart of our city, hundreds stood gazing on the conflagration, deaf to the admonitions of their chief magistrate, either to disperse, or aid him in maintaining the laws; refusing to perform their first and most sacred duties as citizens, which required them to peril life itself, if necessary, in his support. Under such circumstances, all who composed that lawless assembly, whether active participants in the arson, or apparent spectators, refusing either to disperse or aid the mayor, were equally rioters. Had the tithe part of them performed the duty of good citizens, the blackened walls of that once stately edifice would not now be frowning reproachfully upon us. The time has come when such things have arisen among us, that men should be taught their duty to society in such emergencies, unless we desire to substitute unrestrained anarchy in the place of legal government.

It follows from the principles discussed, that all who join in unlawful and riotous assemblies, are responsible criminally for the acts of their associates done in furtherance and pursuance of their common object. "Where divers persons," says an ancient and authoritative writer, "resolve generally to resist all opposers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in doing so happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions, who unlawfully engage in such bold disturbances of the public peace in opposition to and defiance of the justice of the nation." If the fury of rioters is directed against dwelling houses, churches, and the like, and they are destroyed by fire, all concerned in the riot are equally guilty of the crime of arson, and liable to the severe and infamous punishment visited by the law on its perpetrators. These undoubted doctrines of the common law should be known, paused and pondered upon by all who are preparing to join in riots. In doing so they should bear in mind, that they put their lives and liberties in the hands of the most worthless and reckless offcasts of society, who generally are found conspicuous leaders of public tumults.

I have heretofore spoken of riotous and tumultuous assemblies for private objects.—When, however, the objects of such turbulent combinations are of a general and public nature, in which the rioters have no special interest, they assume even a graver character. Thus where the premeditated object and intent of a riotous assembly is to prevent by force and violence the execution of any statute of this commonwealth, or by force and violence to coerce its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by the law, as burning down *all* churches or meeting houses of a particular sect, under colour of reforming a public grievance, or to release *all* prisoners in the public jails and the like, and the rioters proceed to execute by force, their predetermined objects and intents, they are guilty of *high treason*, in levying war against the commonwealth.

Having, I conceive, sufficiently remarked on the nature and consequences of unlawful, riotous and treasonable assemblies, I will proceed to point out the powers vested in the public authorities, and in private citizens, to disperse such assemblies, and arrest their perpetrators. They will be found so ample and efficient as to leave nothing but surprise that their adequacy should be questioned.—An unlawful assembly, such as I have described, may be dispersed by a magistrate whenever he finds a state of things existing, calling for interference in order to the preservation of the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The magistrate has not only the power to arrest the offenders and bind them to their good behaviour, or imprison them if they do not offer

adequate bail, but he may authorize others to arrest them by a bare verbal command, without any other warrant; and all citizens present whom he may invoke to his aid, are bound promptly to respond to his requisition, and support him in maintaining the peace. And a magistrate either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assemblies, subjects himself to an indictment and conviction for a criminal misdemeanor.—When, however, an unlawful assembly assumes a more dangerous form, and becomes an actual riot, particularly when life or property is threatened by the insurgents, measures more decisive should be adopted. Citizens may, of their own authority, lawfully endeavour to suppress the riot, and for that purpose, may even arm themselves, and whatever is honestly done by them in the execution of that object will be supported and justified by the common law. In the great London riots of 1780, this matter was much misunderstood, as it clearly was with us, and a general persuasion prevailed, that no indifferent person could interfere without the authority of a magistrate, in consequence of which much mischief was done, which might otherwise have been prevented.—But, as was observed two hundred and fifty years ago, by the judges who decided as to the right of citizens to arm on their own motion in suppression of dangerous riots, “It would be more discreet for every one in such a case to be assistant to the justices and sheriffs in doing so.” This is equally prudent and sound advice at this time. For on sheriffs and justices is the duty specially cast, of conserving the public peace. The very name of sheriff indicates his duties, being derived from two Saxon words, *scyre*, that is, shire or county, and *reve*, keeper or guardian. He is both by the common law and special commission, the keeper of the peace of the commonwealth within the county, and any neglect or omission on his part in the performance of this great duty to the utmost of his power and ability, subjects him to heavy legal liabilities, both civil and criminal. Of course, to execute such duties and encounter such responsibilities, he must have the means of commanding adequate physical force. For this purpose every citizen capable of bearing arms of every rank, description and denomination, is bound to yield a prompt obedience to his command, and repair to meet him at any appointed place of rendezvous within the county. This duty of the citizen is absolute. He has no discretion in the matter, and if he neglect or refuse obedience to the command of the sheriff requiring his aid in the suppression of a dangerous riot or other insurrectionary tumult, he may be fined and imprisoned for such contumacy, at the discretion of the court. His obligation to come to the aid of the sheriff is just as imperative as that imposed on the latter to see the community suffer no harm from lawless licentiousness. But unless the citizen promptly responds to his call, how is the sheriff to act with effect? His title and wand of office carry no magic with them, by which he can overcome an armed mob. Those who love law and order, should not shrink or hesitate in striking an honest blow for their protection, when threatened by lawless violence. When such a timid and feeble spirit prevails, the days of the republic are numbered.—This general duty, this universal obligation, extends to the citizen soldiers who, in common with all other members of the community, are required to be assistant in the maintenance of the public peace on the call of the civil magistrate. They are subject to the same penalties in case of neglect or refusal to appear, as any other citizen summoned by the sheriff. They do not, on such occasions, act in their technical character as military. When assembled, they are but part of the sheriff's posse, and act in subordination to, and in aid of, that officer, who is the true and responsible chief of all forces summoned under his authority. If the soldiers act in any manner not authorized by law, they are amenable for such acts, not to the military but the civil law. In brief, as to all rights and authorities, they stand on the same footing with the other citizens summoned by the sheriff, and composing with them his posse.

It is said that on the occasion of the recent riots, when the sheriff had summoned numerous citizens to his aid, his command was, with but few honourable exceptions, treated with neglect and disregard. If bills are laid before you, charging such a violation of social duty on private citizens or volunteer soldiers, officers or privates, sustained by sufficient proof, you should without hesitation find them, that the recusants may be dealt with according to law.—It would be unreasonable that such duties and liabilities should be imposed on sheriffs, justices, and citizens, by the common law, and no corresponding authority given them to act equal to any emergency that might arise, or that they should not be protected against lawless resistance in the execution of their public functions.—But both authority and protection, to those who are doing the first duty of citizens, against those who are violating it, are amply afforded by the common law. When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore the public peace, and prevent the commission of criminal outrages against person or property. They may arrest the rioters, detain and imprison them. If they resist the sheriff and his assistants in their endeavour to apprehend them, and continue their riotous actions; under such circumstances the killing them becomes justifiable. In a case where the danger is pressing and immediate; where

a felony has been actually committed, or cannot otherwise be prevented, the sheriff and his assistants not only may but are bound to do their utmost to put down riot and tumult, and to preserve the lives and property of the people.

If one man sees another in the act of burning a church, or dwelling house, or attempting to commit a murder, he has not only the right, but it is his duty to endeavour to prevent him; if the perpetrator resists, so as to make violence necessary in order to the prevention, the circumstances are a sufficient sanction and exculpation for the consequence of the violence, to whatever degree it may extend. This doctrine is undoubtedly sound, both in reason and law, in a case of individual criminality, and individual intervention to arrest it. It is, if possible, clearer when similar enormities are attempted by vast and riotous assemblies, and when the known officers of the law are engaged in the endeavour to prevent their consummation.

The protection given to officers of justice engaged in enforcing the laws, is in like manner full and unequivocal, and such are the sheriff and his assistants, civil and military, engaged in the suppression of a great and dangerous riot, such as occurred in Kensington in May, and in Southwark in July last. It may be premised, generally, that where persons having authority to arrest or imprison, or otherwise to execute the public justice of the commonwealth, and using the proper means for that purpose, are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable: and on the other hand, if the party having such authority, and executing it properly, happen to be killed, it will be murder in *all who take a part in such resistance*; this being considered by the law as one of the strongest indications of malice, an outrage of the highest enormity committed in defiance of public justice against those under its special protection. Ministers of justice, says a great criminal law authority, while in the execution of their offices, are under the peculiar protection of law. This special protection is founded in great wisdom and equity, and on every principle of political justice. And the rule is not confined to the instant the officer is on the spot, and at the scene of action engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same, and therefore if he cometh to do his office, and meeting great opposition, retireth, and in the retreat is killed, this will amount to murder. He went in obedience to the law and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And upon the same principle, if he meeteth with opposition by the way, and is killed before he cometh to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. It follows from these premises that if such an officer successfully resists those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty, he is justified, even should the lives of the assailants, their aiders and abettors, be taken, from the necessary extent of the resistance so made. Surely the way of the transgressor is hard. For it is thus seen that while felonious rioters resisting the lawful authorities may be slain with impunity, if any one of the associates engaged in such common resistance slays an officer of justice, all are involved in the common guilt of murder. And this is perfectly just; for all engaged in such an outrage are aware that their acts are unlawful, and that murder may result from such resistance. Where, however, the resistance is carried on with the use of deadly weapons; where cannon charged with every species of offensive missile, and small arms loaded with ball are used, there is no room for doubt as to all engaged in such resistance being guilty of murder, whether the proof establishes the particular individual on trial to have actually fired the cannon and musketry or not. Being engaged in a riot, the avowed object of which was the killing of the ministers of justice while engaged in the execution of their duty, every man concerned is just as guilty of a murder committed by any one of such a combination, as if he actually struck the fatal blow him-self. How can such a man escape this conclusion? Did he not array himself with a lawless band, armed with the most dangerous and deadly weapons, and having for their direct object the attack and destruction of the officers of the law? If the deaths of the officers follow, that is the intention with which the assault is made. And surely there is neither hardship nor severity in holding all the members of an illegal combination responsible for the acts of each done in furtherance of their common design. In one class of the cases likely to come before you, this clear doctrine both of law and morals is most material to be considered by you. It is a doctrine whose adoption as the basis of your deliberations in the cases alluded to, is of the deepest moment to the common security. Any other would tend to give impunity to riotous murder.

I regret that so much of your time has been occupied by the exposition of general principles. The occasion, however, seemed to demand it. Strange misconceptions as to legal principles, of the first importance in their influence on the maintenance of public peace, and social order, seem to have misled the community. An exposition of the true doctrines of the common law will be found alike calculated to re-assure the timid, and check

the licentious. They will exhibit, that we have laws adequate to meet all public emergencies, if they are firmly and vigorously administered, and that we have nothing to fear except from time-serving pusillanimity in their execution. Their vindication and maintenance is the first duty of patriotism. Living under a government, where the laws derive their existence and force solely from the consent of the governed, where those laws are framed exclusively to subserve the common good, every citizen should regard their infraction as an outrage on himself, and be ready, prompt and eager, to sustain and support them.

In your preliminary inquiries, the first thing which will naturally suggest itself for consideration, is the true legal position occupied by those who are said to have conveyed arms and ammunition into St. Philip's church. This becomes necessary from the fact that one or more persons are recognised to appear before this court for alleged offences connected with this arming.—In resolving this question for your information, we first inquire whether the proprietors of any church, meeting house, bank or other public building, have the legal right to arm it for defence, against the rational and probable danger of a felonious assault; such as threatened arson, that being, by the statute law of Pennsylvania, the crime of those maliciously burning any such building? And secondly, supposing such arming not to be in itself illegal, whether it may not become so from the manner of conducting and motives which induced such arming!—To the first question thus proposed the court distinctly respond, that the arming of a church or other public building against threatened malicious burning by a mob, such arming being induced by a reasonably founded apprehension of the reality and danger of such threats, is no offence against the laws of this commonwealth, but the simple exercise of a clear legal right. By the common law a man is authorized to defend his person, habitation or property against one who manifestly intends or endeavours by violence or surprise to commit a known felony—such as murder, robbery, arson, burglary and the like, on either. This right to defend, involves of necessity, the right to collect and prepare the means of making such defence effective. To deny the latter, makes the concession of the former unsubstantial and illusory. Although there is a peculiar sanctity attached to the habitation of a citizen, and although in defending that which is expressively called his castle, he may go to great extremities, yet that is not the only part of his property he can defend against a felonious assault. Nor can we perceive why the same right, which pertains to individuals, to defend their property so assailed, does not extend to property owned by corporations or other lawful associations of citizens. On the contrary, the law gives to such legal associates the same rights as those possessed by individuals, to defend their property thus attacked, to the last extremity. The right to prepare for such an attack follows from the right to repel it. It is in vain to say that parties so threatened by a mob ought to depend on the preventive justice of the commonwealth, and obtain protection by binding the persons so threatening over to keep the peace.—Against whom, where the wrong is about being committed by a mob, is such application to be made?—The name of the mob is legion. To offer this as the sole protection to individual or associated property against threatened mob destruction, would be to surrender the innocent and unoffending to the tender mercies of rioters and incendiaries.—But it is most material to be borne in mind, that such armings are not under all circumstances lawful.—They may, as was asserted from this bench by Judge Jones at last term, be accompanied by concomitants making them clearly illegal and dangerous breaches of the peace. Thus, if in arranging such means of defence, the parties engaged in it conduct themselves in such a way as naturally to fill the neighbourhood of the scene with alarm and terror; if, from all the circumstances connected with the arming, the object seems to be to invite assault rather than for *bona fide* self-defence; if the intention is to collect and arrange materials for ultimate attack, either on individuals or the general community, then indeed does such arming become a great offence against the peace of the commonwealth, demanding the most vigorous intervention of the law for its suppression. Our ideas on this part of the subject may be advantageously explained by this exemplification. Suppose, for instance, one or more of those fire companies, who are almost nightly disturbing the community with their factious feuds, should openly, insultingly and tauntingly arm their engine houses with deadly weapons; suppose their object in so doing, appears, from all the circumstances attending it, to invite the attack of some obnoxious rival in order to achieve the glory of a successful resistance; suppose such a state of things should spread alarm and consternation in the neighbourhood of their fortification, from the natural apprehension that the blood of the innocent might be shed along with that of the combatants, such an arming would undoubtedly be illegal, and subject the parties engaged in it to criminal censure. Other illustrations of the principle enunciated will suggest themselves to the intelligent mind. Such, gentlemen, are the legal principles which the court unhesitatingly present for your guidance on entering into the investigation of the charges preferred before you, against the individuals concerned in arming St. Philip's church.

It is not my intention, gentlemen, to enter into a particular detail of the facts connected with the recent riots. Their great and shameless notoriety renders this unnecessary. Besides, I have so long trespassed on your attention that I am unwilling further to occupy it. They will appear before you from the examination of the witnesses, and you can readily make the application to them of the law, as expounded. It would also be difficult to do so without committing myself as to some statement that may here be the subject of dispute. It seems to me, therefore, better that for the present I should content myself with the general allusions to them already made, which were indispensably necessary as introductory to the principles indicated for your guidance and instruction.

In considering any bills submitted to you charging parties with murder, treason, arson, riot, or other offences springing from the recent outbreaks, you will apply the facts elicited to the principles expounded, and find or not find the bills as the laws of the commonwealth and the evidence in the case seem to demand.—Nor will I, gentlemen, occupy you with any detailed reference to the ordinary business of the term. The legal nature of the crimes to which human frailty is continually liable, and which form the routine of business of criminal courts, is generally so familiar to gentlemen charged with your duties, that under existing circumstances, I will not engage your attention with any special reference to them. If, however, in the course of your session you should find yourselves embarrassed from the want of any legal information material to the correct administration of your duties, it will be my pleasure, as it is my duty, to furnish it.

On the great business of the term, the opinions of the court have been given to you with a due sense of the responsibilities under which we labour, but without hesitation or equivocation. I am satisfied that on your part your public functions will be performed with an equal regard to the safety and security of the public, and the lives and liberties of the accused involved in the issue of your deliberations.—The result of deliberations conducted under such influences, cannot but meet the approbation of your consciences and the applause of your country.

CHARGE OF JUDGE KING,

ON THE TRIAL OF JOHN DALEY FOR MURDER.

Gentlemen of the Jury:—After a session of excessive labour, we have arrived at the conclusion of the first of a series of causes, which, from the importance of their principles, and the intense interest felt by the community in their results, are without precedent in the history of this Commonwealth. It is not to be expected in the nature of things, but that an investigation in which so much national, political and even religious zealotry are involved, should exhibit the vehement excitement so painfully manifested throughout its progress. In none of these feelings does this Court, in none of these feelings should this jury participate. Our duties are holier. We are the chosen ministers of the people of a great Commonwealth, called upon to decide between her and one of her citizens, who is said to have forfeited his life by the violation of her laws. Our trust equally demands, that the public laws should be vindicated to the full extent to which they have been infringed; but that no particle of the rights of the accused guaranteed by those laws should be compromised in order to accomplish this end. Our duty is to punish offenders, not to immolate victims; to execute the public law, not to search after excuses for its violation. The task we have in hand is one requiring no common effort; but cool heads and honest hearts have achieved results more difficult. And rarely have these constituents of impartial justice been more urgently demanded. We have had given us versions of the unhappy events leading to this homicide, coming from sources apparently equally trustworthy, seemingly irreconcilable with one another.

To those familiar with judicial investigations there is no novelty in this. We are perpetually observing that witnesses, apparently equally honest, describing transactions occurring in large, tumultuous and highly excited assemblies, are in some of their statements respecting even prominent facts, in direct collision. These discrepancies may arise from various circumstances. One man, from his immediate contiguity to the scene of the occurrence he describes, from his attention being particularly directed to it; from his nervous organization, being cool in the midst of danger and excitement, and from the natural superiority of his observing faculties, may truly detail actual events of instantaneous occurrence, which another, of equal integrity and seemingly with the same means of knowledge, but less favourably circumstanced, has not noticed, and therefore

denies to have existed. The jurist, familiar with the nature and course of these disturbing influences, makes the just allowance for them, and endeavours to reconcile such conflicting statements. Where some witnesses testify to an occurrence happening under their direct observation, and others swear they were present and did not see it, if the thing said to have happened be such as it may reasonably be supposed some might see or hear, and others not, by reason of any of the causes stated, the jurist rather concludes both have given their exposition of the facts honestly, than that either has fore-sworn himself. But if witnesses are in such direct collision that their testimonies cannot be reconciled, the duty of the inquirer after truth becomes more complicate. He should first consider the number of witnesses on each side, as multiplied perjury is less probable than individual instances.

He should then consider the capacity of the witnesses for observation, having regard to their apparent intellectual power, and steady coolness of character, as displayed in delivering their testimony. He should, however, have especial regard to the relative difference of the conflicting witnesses to the point in question. Where two men testify to the same fact, in direct opposition to each other, the one having no particular interest, sympathy, or prejudice on the subject matter of investigation, the other manifesting all the heat, bias, and zeal of an excited partisan, we are certainly more likely to obtain unvarnished truth from the former than the latter. In any and every case assuming from its circumstances a partisan character, it is always safest, if practicable, to come to our conclusion as to its real merits through lights drawn from sources having no connexion with either of the contestants. Finally, in estimating the comparative forces of conflicting testimony, you are to look into the probability or improbability of the respective statements arising from the nature of the subject in question. Having tried them by these tests, you should adopt the one most consonant with the convictions of your understanding.

In a case like the present, which is readily divided into several distinct and prominent parts, you will be greatly aided by taking up these parts in detail, and in the order of their occurrence. In no other way can truth be so well arrived at, in a transaction extensive and complicate in its incidents, and testified to by numerous witnesses. If in such an inquiry we look only to the testimony of an individual in order to form an opinion of the whole transaction, we are involved in contradictions which want of ability in the witness accurately to cover the whole ground of inquiry must almost inevitably produce.

This will be avoided by the more philosophic mode of examining the proofs of each subdivision in detail, and forming conclusions of the whole transaction in connexion, by the aggregation of the results of inquiries as to each distinct part. This mode of arriving at truth may indeed be more tedious than by blindly attaching exclusive faith to individual statement. But the present is a case in which we are called upon to spare no labour to get at exact and certain truth; one in which nothing would justify impatience or indifference in its investigation. If we desire that the result of our toil be received with the respectful and deferential acquiescence which ever follows impartial and honest judicial action, we must manifest that we have commenced and concluded our labours with an exclusive view to equal justice, and that our decision arises from the sober deductions of reason and judgment, anxiously and conscientiously applied to the facts and law of the case.

In the present state of our mutual exhaustion, I will not attempt a full recapitulation of the voluminous testimony in the cause, all of which has been reduced to writing, and accessible if required. I will content myself with a summary of the case as represented by the testimony of the commonwealth and defendant respectively, so far as such summary seems necessary for the clearer understanding of the principles of law in which the opinion of the court are applicable to each version of the facts assumed by the commonwealth and defendant.

The case supposed by the commonwealth to have been established by their testimony is this: On Friday, the 3d of May last, a meeting of about three hundred citizens assembled in the Kensington District, on an open space at the corner of Master and Second streets, for the purpose of considering the expediency of a proposed alteration of the law of the United States, in reference to the naturalization of foreigners, and promoting the ends and objects of the Association known as the Native American Party. The meeting was organized, and the officers being placed on a temporary platform, erected for the purpose, Mr. S. R. Kramer commenced an address, but was interrupted by a large number of persons opposed to the objects of the meeting, among whom this defendant was particularly prominent. A scene of confusion arose, and shortly after the opponents of the meeting rushed forward, pulled down the platform, and dispersed the meeting. To this violence the meeting offered no resistance, preferring to submit to the aggression rather than resort to a forcible maintenance of their rights. It was, however, agreed by some that an adjourned meeting for the same purposes should be held on Monday, the 6th of May, at 4 o'clock in the afternoon, at the same place. This

version of the events of the 3d of May is proved by the testimony of William Craig, S. R. Kramer, John M'Manus, and William Friheller. It was Craig who proves Daley's presence and participation.

On Monday, the 6th of May, a large meeting assembled pursuant to this adjournment. After organizing, one or more persons addressed the meeting, but a heavy shower suddenly coming on, caused an adjournment to the Washington market, which is in the immediate vicinity of the first place of assembling. The only event which disturbed this meeting before its adjournment, arose from a man, named O'Neill driving a horse and cart through the assembly, and shooting down its load of dirt in their midst. The Washington market stands north and south on a street of that name, running in the same direction. On the west, Washington street is divided from Cadwalader street, which runs parallel with it, by a strip of ground about 150 feet wide, partly vacant. And on the west side of Cadwalader street stood the Hibernia Hose house. No house intervenes, between the west side of Cadwalader street, on that part of the dividing strip, between the hose and market house, so that the communication between them is direct and uninterrupted. Shortly after the meeting re-assembled in the market, and almost immediately after the speaking re-commenced, it was interrupted by a number of Irishmen. This at once produced a fight between one of the Irish and a Native American, that led to a collision, which drove the Irish from the market. About this moment Sharp, the witness who gives us this account, says he saw a gun pointed out of a raised window in the Hibernia Hose house and discharged against the crowd. This shot was returned by one of the meeting from a pistol, and afterwards by two or three other persons. The firing on the meeting then became more general, until it was routed and dispersed. John Daley, the prisoner, was seen firing on the meeting, from a point not in its immediate vicinity, by Sophia Clark, who has stated the circumstances before you in detail.

It was at some stage of the firing on Monday that George Shiffer was killed. Several other persons, Sophia Clark says ten or twenty, besides the defendant, were observed firing on the meeting from the vicinity of Master street, which lies south, and Jefferson street, which lies north of the market, and the Germantown road, which runs parallel with Washington and Cadwalader streets. None of these persons seem to have been at the actual scene of the first outbreak, but acted with the assailants of the meeting at those distant points.

In respect to the origin of this transaction, it is proved by John Donnel, who, to a certain extent supports Joseph Sharp, that he was among the first of the meeting of the 6th of May, who came over from Second and Master streets to the market, when the adjournment consequent upon the rain took place. He there saw a man somewhat intoxicated, with his shirt sleeves rolled up to his elbows, who exclaimed, as the Natives rushed toward the market, "Keep the damned Natives out of the market house; this ground don't belong to them—this is ours." He says there were thirty or forty persons present with their sleeves rolled up in the same way, and as he said the word, they all started up and got close together, cheering and huzzaing as the Natives entered the market house; that this man struck the first blow. The witness then went away, and had not proceeded more than one hundred feet when he heard the first firing which seemed to proceed from Cadwalader and Master streets. Afterwards he heard a good many shots, but who they proceeded from he did not know. The witnesses of the commonwealth who speak in reference to the doings of Monday, the 6th of May, are Augustus R. Peale, Sophia Clark, Wm. Craig, Joseph Sharp, John Donnell, John Perry and George Friheller. This occurrence, which was certainly calculated to produce excitement, aroused the most intense feeling in the public mind. A meeting was called to be held on the next day, Tuesday, the 7th inst., in Independence Square, which, contrary to the advice of the more prudent and judicious leaders of the Native American Party, adjourned to reassemble at the Washington street market house, in Kensington, to which they proceeded in a body, all, say the Commonwealth's witnesses, without arms—the great body certainly unarmed. The meeting carried with them an American Flag, across which was an inscription in these words: "This is the flag that was trampled on by the Irish Papists." The approach of this meeting seems to have been anticipated and fully prepared for by the Irish party. One witness for the commonwealth, Mrs. Morton, proves that while the meeting was advancing up Second street, towards the scene of action, she saw several men in Cadwalader street, who, as the meeting crossed Cadwalader street, exclaimed: "Now the women and children in the houses, and every man to his gun." About the same time, Stephen Winslow saw a crowd standing at the corner of Cadwalader and Master streets. As the meeting advanced, they ran up Germantown road to an alley, exclaiming, "Get the guns." Of these, six or eight went into the alley and came out each with a musket. Edwin Greble, from curiosity, rode up in a carriage in advance of the meeting, and stationed himself in Second street, opposite Harmony Court, in which Daley, the defendant, resided. As the meeting approached, he saw a number of armed men standing in and about the court. The first demonstra-

tion he saw from the meeting below, was four or five boys running out of the market house, north-east; when these armed men above deliberately levelled their guns and fired. They seemed to go up Harmony court, load, and run out towards the market, and fire. Some fired where they stood. One man appeared to go stealthily, as if seeking for game.

Martha Longshore swears positively to the defendant Daley being among the party in the vicinity of the Germantown road, Harmony court, and Jefferson street. She saw him with them with a gun, which he discharged down Jefferson towards Cadwalader street, returned and loaded his gun. Mr. O'Neil, one of the defendant's witnesses, saw him at a late hour in the same vicinity with a party of eighteen men, all armed, and he among the rest. Wm. Friheller saw him with the same party with a powder flask assisting them to load. Jacob Trollenger saw him furnish them with ammunition. Harmony court seems to have been the head quarters of the Irish party, and from that point and its immediate vicinity was the position from which those not operating in the houses acted most unitedly and effectually. The meeting had not all reached the market house when the first blood was shed. When part had arrived and were about organizing, Thomas S. Harris states that he inquired of some one for the Hibernia hose house. It was shown to him, and as he got his eye upon it he saw a gun pointed out of the second story window and fired upon the crowd. The crowd immediately rushed to the hose house, forced its doors and dragged the carriage towards Master street. At this moment a volley was fired in the direction of the carriage, and another immediately followed. That after this he turned and saw a man with a gun come from behind a brick house in Cadwalader street, kneel down and fire. This shot was said to have killed a man named Young. Fortunately for Young, he escaped with a severe wound, the ball passing through him. That the first firing came from the vicinity of the Hibernia hose house.

The general course of the testimony shows the difference between the witnesses to be whether the firing preceded or succeeded the attempt to break into the hose house and take and destroy the Company's carriage and apparatus. The firing into the market house then became general and severe. Mr. Peale says he remained in the market house about fifteen minutes, and that all that time it was fired into. On leaving it he went into Cadwalader street, where one ball passed close to his ear, another through his fingers, a third struck his hand, but its force being spent did him no injury, and a fourth struck his left arm, splintering the bone to such an extent as to require immediate amputation, and thus maiming him for life. The meeting was routed and dispersed by the severity of the first attack. But a rally was soon made by the routed party; deadly weapons were collected, and a desultory and bloody combat continued between the parties until the approach of the military, late in the evening, arrested the combatants. The Commonwealth's witnesses generally deny that there were any ostensible arms among the meeting at the outset of the affray, but the proof is perfect that their opponents, to use the language of one of the defendant's witnesses, were "armed to the hilt," prepared for their reception. One man is shown by George Young, a witness examined for the Commonwealth, to have been at the meeting armed with a double barrelled gun.

The next material circumstance occurring on the 7th, is that of the death of Hammit. All the testimony seems to agree that he was shot at the corner of Jefferson and Cadwalader streets. How and by whom are the disputed points. George Friheller proves that he saw one of the party at Jefferson street, and Germantown road, in which association Daley is distinctly traced by the Commonwealth's evidence, take deliberate aim with his gun at a man coming across Jefferson and Cadwalader streets. The man fell. This person had a gun lying across his arm; which when he fell a man came down Cadwalader street and took away. The witness then says that some men came waving handkerchiefs to take the body away, but that the firing party pointed their guns at them and cried "let him lay." That these men returned, and dragged the body away by the arms. John McCleary proves that he saw a man lying dead in Cadwalader near Jefferson street. That he attempted to remove the body, when the men at the corner aimed at him; that he waved his hat at them, and that with the assistance of another young man he carried the body down Jefferson street; that these men fired at them and they dropped the body, which they afterwards took up and removed. He afterwards learned the name of the deceased was Matthew Hammit. Peter Kenney, one of the defendant's witnesses, states that Matthew Hammit crossed over to the corner of Jefferson and Cadwalader streets; that two of the men at the corner of Jefferson street and the Germantown road, fired at him and missed him; that then one knelt, took deliberate aim at him, fired, and Hammit fell. That at the moment he was shot, he had his gun pointed up Cadwalader street, in a direction north; the men who shot him standing at the corner of Jefferson street and Germantown road, west. That when some men came to take the body of Hammit away, these men at Germantown road aimed, but did not fire at them; that the men near Hammit's body then waved their handkerchiefs, and those at Germantown road cried out to them to take his body away; that Daley was back and with these men but had no gun. John Daley, another of the com-

monwealth's witnesses, saw Hammit shot at the north-east corner of Jefferson and Cadwalader streets—he saw him fall on the pavement, with his head to the curbstone. He heard the report of guns, but does not know from what quarter the shot came that killed him. As he received the wound, his tarpaulin hat flew off, the ball penetrated the brain, passing through his ear. The witness went in pursuit of assistance, returned with M'Cleary and another person, and attempted to remove the body. Before they got to the body, the men with arms pointed them at the witness and the man assisting him, when they waved their handkerchiefs, and then the armed men halloed to them to take the body away. When, however, they had carried the body about fifteen yards, they were fired at, but not, it seems, by the men at the corner of Jefferson street and the Germantown road. The body was then carried away.

Independent of the testimony for the defence, it would seem very clearly established by this chain of testimony coming from four witnesses, that Matthew Hammit lost his life by a fire from the party at the corner of Jefferson street and Germantown road. William Shields, one of the commonwealth's witnesses, certainly throws some doubt on this otherwise clear statement. He says he saw Hammit coming up Master towards Cadwalader street, with a gun in his hand; that he advised him to stay away, but he refused taking his advice, saying he would "stick to them." He says he fell at the corner of Jefferson and Cadwalader streets, the witness standing in Cadwalader street, ten feet below Jefferson; and that he saw him shot from a blue frame in Harmony Court, by a short man, in a frock coat, having a black hat on. He says that before he was shot, he fired his gun in Cadwalader street near Master street. How far this statement shakes the conclusions seeming to follow the testimony of the other witnesses is for your decision. The witness was before you; you heard his statement, saw his manner, and can estimate how far his recollections are to be preferred to those of others describing the same transaction. It seems clear from all the testimony that when Hammit was killed, he was alone; the only associate he had with him about that time was Wm. Shields, who left him before he was shot. He therefore was not at the immediate instant of his death directly engaged with any associate in wrong. The witnesses who describe the armed band congregated at Jefferson street, Germantown road, and Harmony court, and their deportment from the time the meeting came in sight, up to the arrival of the military in the evening, are Martha Longshore, Jacob Trollenger, Wm. Friheller, J. W. Barton, Edwin Greble, John M'Cleary, Stephen Winslow, John Daley, Wm. Shields, John M'Kee, George Friheller, John Craig, and John Steel. Having thus given you a general sketch of the commonwealth's case, which I leave you to fill up from your recollections of the testimony, I will in the same way endeavour to group the testimony of the defendant following in the like order. In such a generalization, I may omit many things which the defendant's counsel regard and have commented upon as important to the defence. Of course all these matters will be properly estimated by you, in considering of your verdict, which is to be founded on the entire testimony adduced. I wish you distinctly to understand, that these summaries are given for the better appreciation of the principles of law, which it is my duty to expound to you; not to control or interfere with your right to pass upon the facts. And first, as to the defendant's version of the transactions of the third of May. The only witness examined on the part of the defendant, in respect to the doings of that day, Joanna Maloy, substantially shows the violent and unjustifiable breaking up the meeting. She however says, that previous to this event the speaker said "that there was a set of citizens, Germans and Irish, who wanted to get the Constitution of the United States into their own hands, and sell the country to a foreign power." That some one from the meeting exclaimed "that is the Pope, to hell with him." That another individual called the speaker a liar, and said he was an Irishman and a naturalized citizen, and would support the constitution. It was at this time and under these circumstances, that the rush was made at the stage, which was pulled down and the meeting dispersed. It is here proper to call your attention to the fact, that the speaker, on that occasion, Mr. Kramer, distinctly denies having used the language attributed to him by Joanna Maloy at this, or any other time, in addressing the public in maintenance of the principles of his party. He is supported, with respect to the 6th of May, by the testimony of John M'Manus.

In reference to the events of the 6th of May, the testimony of the defence is in more serious collision with that of the commonwealth. The testimony however generally, seems with that of the commonwealth, to show that until the adjournment of the meeting from the corner of Second and Master streets to the Washington market, the meeting was not disturbed otherwise than by O'Neil's cart. It was after the meeting had commenced their deliberations in the market, that the first serious difficulty between friends and opponents arose. At this time the defendant's testimony shows, that a fight originated on the western side of the market house, between two or more persons which was joined by others, amid cries of "Kill the damned Irish," and the like. Almost immediately after this fight began, a pistol or pistols were discharged from the eaves of the market

towards Cadwalader street, which the defendant's witnesses say were the first fire-arms used. The firing was returned from an alley near the Hibernia hose house. At the commencement of the firing, the body of the persons assembled in the market house dispersed. A combat with brick bats and similar missiles, was however afterwards maintained by the few who remained. During this conflict which lasted some time after the first onslaught, fire-arms were used by both sides. Towards night the neighbourhood became apparently quieted. After night fall a number of persons attempted to set fire to a Roman Catholic school house, at Second and Phoenix streets. They were fired upon by persons prepared to defend it, and two persons, Wright and Ramsey, killed. The assailants were dispersed, and with this unhappy and deplorable incident the eventful 6th of May terminated. The witnesses sustaining these views are Joseph Wood, Alexander Brown, Alfred M. Clark, Wm. F. Small, Mary Baker, Joanna Maloy, Michael Keenan, A. Mullin, Elizabeth Browne, Edward Sheridan. Besides these the defendant Daley standing on his defence independent of the general grounds taken, attempted to prove that he was at another place on the afternoon of the 6th of May, and not interfering with the meeting at Washington market. The witnesses examined to prove this defence technically known as an alibi, were Sarah Dillon, the prisoner's step-daughter, and Elizabeth Bennett, a next door neighbour. Of course, in applying the events of the 6th of May to the case of John Daley, this testimony will be considered. Always bearing in mind that a position of this kind taken by an accused, is one that demands from the jury the closest scrutiny. It is a defence frequently simulated and often resorted to, in order to defeat justice; although when clearly proved is among the most satisfactory of defences. The events, however, of the 6th of May, like those of the 3d, are not the primary objects of inquiry. They are only important as manifesting the mind of Daley and his associates, in the doings of the 7th, which it is insisted by the commonwealth were but the continuation and consummation of the original violence of the 3d and 6th.

The history of the doings of Tuesday, as it is presented by the defendant's testimony, is in much stronger collision with that of the commonwealth. And as the transactions of that day are the main subjects of this inquiry, the testimony bearing on them on both sides demands peculiar attention. This testimony naturally begins with the call and character of the public meeting which assembled at Independence Square, on Tuesday, the 7th of May, at 3 o'clock. This meeting was summoned by Mr. Peale, and in the form he originally put the call there seems to have been no offence. At the instance of a Mr. Gihon, a postscript was added in these words, "Let every man come prepared to defend himself." As to this fact no difference exists in the testimony. A meeting accordingly assembled, at which much vehemence and feeling were manifested. A proposition made by Mr. Peale to hold an adjourned meeting on Thursday failed, the excited majority resolving to adjourn to meet forthwith at the Washington market, in Kensington. Several witnesses have been examined to prove that arms had been actually brought to the meeting. Jacob Loudenslager, one of the city police, proved that he took a double barrel gun from a man in the State House yard, who when asked what he purposed doing with it, said he was going up to Kensington. The gun was taken from him and given into the custody of the Mayor. This witness saw no other guns in the meeting. George B. Brown says he saw two persons with horse pistols, which they concealed with their handkerchiefs. Mr. O'Neil says he saw one man with an iron barrelled pistol, another with a double barrelled one disputing which was most effective. As the meeting approached its destination he saw one man cross to Cadwalader street with a gun; that after him followed three men with guns in advance of the meeting. Lewis Snell proves that two men with guns joined the meeting at Second and Coates streets, the vicinity of the place of meeting, probably the persons seen by Mr. O'Neil. R. J. Fougeray saw the meeting at Phoenix and Second street, near the market noticed a number of men with arms. Some with single and some with double barrelled guns. I have said that the commonwealth's witnesses deny distinctly that there was any ostensible arms when the meeting left Independence Square. These statements are reconcilable on the supposition that some openly armed men joined the procession in its progress, as is stated to have been the fact by Snell. The meeting proceeded, on the adjournment, towards Kensington in a very large body, carrying with them an American flag, across which was written, on a placard affixed to it, "This is the flag that was trampled upon by Irish Papists." It may here be observed that one of the defendant's witnesses, Joanna Maloy, proves that the flag raised at the meeting of Monday was dragged along the ground in the hurried adjournment which followed the rain, which first caused the separation of the meeting.

The first witness in order of time who proves the circumstances connected with the inception of Tuesday's meeting on behalf of the defendant, is George H. Martin. He was at the meeting in Independence Square, in which he says he saw no fire-arms. Being on horse back, he arrived in front of the market about fifteen minutes before the

main body reached it; he stood in the street at the north end of the market house, and was there a few minutes when the meeting arrived at the south end, near Master street. He saw two Irishmen and two women in the street; the crowd, he says, commenced stoning the women, and on his calling on them to desist they did so; he told the Irishmen and the women to go home, which they did unhurt. The people then began to throw stones at the houses on the west side of the market; one man ran and jumped with both feet against the door of one of the houses: thinking they would be defended, he retired and had not gone more than twenty yards before he heard the report of fire-arms, and the crowd soon dispersed. After the dispersion of the meeting, and about an hour after the crowd first came up Second street, he saw a body of some twenty or thirty men form in files of two abreast, armed with shot guns, come up through the market, formed in open order on the lot, and commence a fire at the houses on the west of the market. The fire was returned from the houses on Cadwalader and Washington streets, which was kept up for half an hour; one man was killed at the west end of the market house: the firing he says was continued in various places until the arrival of the military. R. J. Fougeray, another witness for the defendant, saw the meeting coming up Second street: the witness went to the S. W. corner of Cadwalader and Master streets, and saw the procession come up. But a few moments elapsed when the boys and men at the head made an attack on the Hibernia hose house and broke the doors open. He was on a line with the hose house, and not a hundred yards from it. He saw some men at the corner of Cadwalader and Jefferson streets with guns, who fired down Cadwalader street, as he thought, at those attacking the hose house; this fire was returned by some eight or ten men on the open lot at Master street: then the firing became general. Witness remained in his original position until Rhinedollar was brought down dead. This combat continued from an hour to an hour and a half. He says the disturbance began with the arrival of the meeting; that there was no attempt to organize. The demonstration upon the hose house came from the meeting, and the first firing came from Jefferson street after the attack on the hose house. After the firing began, a number of persons came from the direction of the city with fire-arms. When the men from above fired, they ran; he could see as far as Harmony court, and saw persons fire from that quarter. John Matheys states that he came to the ground in a cab with some friends, and taking his station on the south side of Master and east side of Cadwalader streets: saw a number of boys at the head; the disturbance began by the boys, who rushed to the hose house; battered the doors with stones; burst them open, and were about taking the carriage out, when he heard the first shot; they took the carriage down the street, and were breaking it, when there was firing again; afterwards they commenced firing sharply on both sides. He says the carriage was taken out before any shot was fired, and that shot was from a pistol. When they attempted to break the carriage, the firing was heavy and the crowd desisted. He saw firing from the houses, &c., from the pavement on the west, firing eastward. He saw men among the crowd with muskets and fowling-pieces. When he left the crowd they appeared forced back by the firing of their opponents. To questions put by the court, he said the first fire came as the boys were about taking out the hose carriage; that he thought it was a pistol from firemen defending the hose house. That it caused a rush to the house by the men and boys, who took the carriage to the lot and attempted its destruction: and that then there was firing from the hose and other houses. This witness says he saw four or five men with arms march from the people who came up Second street, into the lot in front of the hose house.

Alfred M'Clark's testimony has not the same minuteness as that of these witnesses, but it is generally confirmatory. Wm. Buck testifies that he met the crowd in Second street, and begged them not to go up to that market, as many would be killed and the balance would have to run away. The reply was, that they would be afraid to do anything as they had got such a crowd. William Heedman was at the market when the procession arrived; says they attacked the hose house with brick bats and stones, and got away the carriage; that after the carriage was out the firing began from the hose house and houses near it. That the first came from the hose house, and that he heard no fire from the north end of the market, nor the market itself, and, if there had been any, thinks he would have heard it; that there were eight or ten guns fired from the hose house. Joanna Maloy was in the Master street school house; saw the crowd come up Second street; they made a rush towards the market, and, as they were crossing, several guns were fired from the crowd; that then the hose house was broken open. John W. Keen came up with the meeting; saw a man throw a stone at the hose house; that then the mob burst it open, and the carriage was brought out, when a shot was fired, followed by others. Some ran when the firing commenced, which was from those opposed to the meeting; the fire dispersed the meeting almost entirely, and, as the witness went down, he saw men coming up with guns, who appeared to have come from the Northern Liberties. Mrs. Brown states that there were rumours that the Natives were coming up

on Tuesday. Mrs. Malone states she saw the meeting arrive between four and five o'clock; that some of the men, armed with guns, pushed her down on the cellar door, broke into her house, inquired for arms, asked her if she would die for her religion, said they would shoot her husband to inches, if they had him, but would not hurt a woman. Finding no guns, they went away. This witness was manifestly in a great, and, under the circumstances, natural state of trepidation and alarm from the terror of the scene and anxiety for her husband. Francis Brady's testimony is of a general kind, descriptive of the effect produced by the events of the afternoon on the inhabitants of the district.

When the testimony relating to the events of Tuesday is carefully collated and compared, the extent of the collision between the different witnesses is not so serious as would at first be supposed. The essential point of difference between them, is as to when the Irish party first fired, whether before or after the Hibernia hose house was rushed upon and broken into by a portion of the meeting. The commonwealth's witnesses, who speak directly and affirmatively to this part of the case, declare the first fire to have come from the hose house, before any attack upon it. This is as distinctly denied by the defendant's witnesses, who assert the first fire to have followed the assault. In point of numbers, the witnesses of the defendant certainly preponderate, and there are among them many native American citizens, having no apparent connexion with either of the conflicting parties. It is for you to consider and determine on which the greatest reliance is to be placed. From the whole testimony it also appears that the meeting was generally routed by the first firing, and that the subsequent bloody contest was between the assailants of the meeting and a body of armed men, who rallied and formed on the vacant lot on the north side of Jefferson street, whose appearance and conduct are clearly described by Mr. Martin. It was about this time that Hammit was killed—Shields, his companion, says that he heard the guns going off over by the market, about five o'clock; that he went over to the property of John Rox, corner of Second and Master streets, and after seeing the firing and riot, he "backed out a little while; that he saw Mr. Hammit coming up Master towards Cadwalader street; told him he had better stay from there, but Hammit said he would go, and refused to take his advice, saying he would "stick to the rioters." This testimony would seem to fix the time of Hammit's approach to some time after the firing began, and to render it probable that he acted in unison with the armed body described by Mr. Martin. I will conclude this summary by calling to your recollection the testimony as to the previous good character of the accused, which, if the proofs of his guilt are at all doubtful, will receive its due estimation in your deliberations. If the call of the meeting of the 3d of May, was addressed exclusively to persons favourable to its objects, the interference of individuals, hostile to its proceedings, and the breaking up and dispersion of the meeting by them, was a gross outrage on the rights of those who called it. It was a riot of a flagrant kind. Any body of citizens having in view a constitutional and legal purpose, have the right, peaceably and quietly to assemble together for its consideration and discussion. Any attempt by another body of citizens opposed to the objects of the assembly, to interrupt and disperse it, is not to be tolerated. In this instance it has led to the long train of riots, murders, and arsons, which have disgraced our city and shaken the foundations of social order. American citizens, native and naturalized, should act on the principle that error is harmless while reason is left free to combat it. Every attempt by force and violence, to interfere with the rights of citizens, to meet and discuss proposed lawful public measures, is the direct infraction of a vital principle of our institutions, State and National. But a public meeting, otherwise legal, may, from the manner, place, and circumstances of its organization, become an unlawful and even a riotous assembly. Thus, if it is true, as has been stated in proof here, that the meeting of the 7th of May, in Independence Square, was convened under a notification to those who attended it to come armed; if in pursuance of such a suggestion, it was attended by persons armed with deadly weapons; if the meeting so summoned and assembled, adjourned to march in a body to a place principally inhabited by citizens notoriously opposed to its objects, openly exhibiting arms, and displaying banners containing inscriptions lacerating to the feelings of such citizens, the assembly sunk from the dignified position of a body of freemen exercising a great constitutional right into a mere riot. The adjournment of this meeting to Kensington, was as imprudent as it was illegal and disastrous; and it is to the credit of some of the gentlemen concerned in getting it up, that they strove against it; and most unfortunately for this community their sober counsels were disregarded, and those of rash and hot-headed zealots adopted. The sorrowful history of the 7th of May would not have been found in our city's annals, nor the painful task imposed on us, of deciding the solemn question whether many of our fellow men shall live or die for acts consequent upon this adjournment. In expressing the opinion of the court, on the legal principles involved in this inquiry, I will, after noticing the general doctrines discussed, examine those urged by the Commonwealth, as requiring the conviction of the

accused; and afterwards consider those insisted upon as demanding his acquittal. In performing this duty, I shall simply expound principles, leaving their application to you.

Murder, as defined by the common law, is when a person of sound memory and discretion, unlawfully kills any reasonable creature in being, and in the peace of the commonwealth, with malice prepense or aforethought, either expressed or implied. Each branch of this definition must be carefully considered, but the last requiring the act should be done with malice aforethought, demands peculiar regard. Malice in the legal, as contradistinguished from the popular sense of the word, does not denote a spite, or malevolent feeling against the deceased in particular, but that the fact of killing has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit—a heart regardless of social duty, and fatally bent on mischief. Express malice is where the killing is the result of a sedate, deliberate mind, and formed design; this internal feeling being manifested by external circumstances, such as antecedent menaces, former grudges, and concerted schemes to do the party bodily harm. Malice is implied by law from any deliberate, cruel act, committed by one person against another, however sudden; or where the fact has been attended with such circumstances as to carry with them the plain indications of a malevolent and diabolical spirit. Although in homicide there may be no provocation of such a character as to rebut the legal inference of malice, yet provocation has its defined legal limits. No breach of a man's word, no mere trespass on his lands or goods, no insults by words, however offensive, will free a party killing, from the guilt of murder. This rule certainly holds good where the party killing upon provocation, makes use of a deadly weapon, or otherwise manifests an intention to kill. None can doubt that gross insults, or wanton destruction of property, are as well calculated to provoke, as anything which can be done by one man to another. Yet the law, wisely judging that too great latitude should not be given to the taking away of human life, refuses to extend it to the provocations enumerated, particularly where the party killing uses a deadly weapon.

Where divers persons resolve generally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in doing so happen to kill a man, they are all guilty of murder; for they must at their peril, abide the event of their actions, who unlawfully engage in such bold disturbances of the public peace, in opposition to, and in defiance of the justice of the nation. Malice in such a killing is implied by law in all who were engaged in the unlawful enterprise; whether the deceased fell by the hand of the accused in particular, or otherwise, is immaterial. All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but has been found necessary, to prevent riotous combinations committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of the homicide. Where, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no connexion with the common object, the responsibility for such homicides attaches exclusively to its actual perpetrators.

The doctrines so far expressed, are those of the common law. It is therefore proper that your attention should be turned to the act of 1794, to see how far these doctrines have been modified by that statute. By the act of 1794 it is declared, that all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree. By an unbroken chain of decisions from our courts of the highest resort, as well as the subordinate tribunals following them, from the passage of the act to this time, it has been held, that the true and only modification of the common law, introduced by it in the crime of murder, is this:—To constitute murder of the first degree, the intent of the party killing must have been to take life; whereas, by the common law, if the mortal blow is malicious, and death ensues, the perpetrator is guilty of murder, whether such an intention does or does not appear to have existed in his mind. The injury being malicious, the common law holds the offender responsible for all the consequences following his unlawful and malicious act. The first inquiry, therefore, of a Pennsylvania jury, after a felonious and malicious homicide is established, not committed by means of poison, or lying in wait, or in the perpetration of one of the felonies enumerated in the act, is, whether the mortal blow was given with an intent to take life, or merely to do great bodily harm. If the former is proved by the evidence, the crime is murder of the first degree; if such intent does not satisfactorily appear, the jury should return a verdict of murder of the second degree. In ascertaining the intent of the perpetrator of a malicious homicide, difficulties may, and continually do

arise. Hence, juries inclining, as they always will do, to a merciful interpretation of the motives of the accused, often render verdicts which surprise the general public, not familiar with the delicate nature of the question involved.

In the solution of such a question, an easy and safe criterion of the intent with which the act is done, may be found in the means by which the homicide has been committed. If the means of death is a deadly weapon, used in an unequivocal manner, the inquiring mind can come to no other conclusion but that the death of the victim was intended. Thus, if one man shoot another through the head with a musket or a pistol-ball—if he stab him in a vital part with a sword or a dagger—if he cleave his skull with an axe or the like—it is almost impossible for a reflecting and intelligent mind to come to any other conclusion than that the perpetrators of such acts of deadly violence intended to kill. I have put strong instances in order better to exemplify the principle. In its practical application, a variety of cases less urgent in their circumstances, will necessarily arise. It is true, the act says the killing must be wilful, deliberate, and premeditated. But every intentional act is of course a wilful one, and deliberation and premeditation simply mean that the act was done with reflection, was conceived beforehand. No specific length of time is required for such deliberation. It would be a most difficult task for human wit to furnish any safe standard in this particular. Every case must rest on its own circumstances; the law, reason and common sense, unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of premeditation. Whether the fact of killing was or was not malicious, still constitutes the great inquiry on the trial of every indictment charging murder. For even where the intent to kill is unquestionable, still the killing must be malicious, to constitute murder. Where the killing is without malice, though it be unlawful, it is but manslaughter. If, therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go in a field and fight, and one be killed, it will be but manslaughter in the survivor, because it may be presumed that the blood never cooled. And it must be observed with regard to sudden encounters, that when they are begun, the blood previously heated, kindles afresh at every blow, and in the tumult of the passions in which the mere instinct of self-preservation has no inconsiderable share, the voice of reason is not heard. Therefore the law, kindly appreciating the infirmities of human nature, extenuates the offence committed under such circumstances, from murder to manslaughter. In the whirlwind of passion accompanying such illegal conflicts, the law supposes that malice aforethought, the vital element of murder, does not exist. In one view of this case, this doctrine may become material to be regarded. A man may repel force by force in the defence of his person, habitation or property, against one or many who manifestly intend and endeavour by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defence in cases of this kind is founded on the law of nature, and is not nor can be, superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant attendant upon him, or any other person present, may interpose for preventing mischief, and if death ensues, the party so interposing will be justified. Here the law of self-defence plainly coincides with the dictates of reason. An attempt is made to commit arson or burglary on the habitation; the owner, or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended. Here, likewise, nature and social duty co-operate. A riotous and tumultuous body attempt to commit an arson on a church, or to maliciously burn and rob a bank; they may be resisted to the extreme extent required to repel them, and life itself may be taken, if the necessity of the defence demands it. In these cases the party killed is engaged in the commission of a crime of the highest grade, next to murder or treason, and he may be lawfully resisted, even unto death.

But a mere trespass on a man's property, not his dwelling-house, will not justify the owner in taking away the life of the aggressor in protecting it. For the rule of the law is, that where such trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon, and if he do so, and with it kill the trespasser, this will be murder; because it is an act of violence beyond provocation; but if the injury be inflicted with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter—the law so far recognising the adequacy of the provocation arising from the trespass. Under what circumstances the lives of rioters concerned in the commission of unlawful acts may be justly taken by officers or citizens, I have had occasion already to express during the present term—I then stated that where an actual riot exists, particularly when life and property are threatened by the insurgents, citizens may, of their own authority, lawfully endeavour to

suppress the riot, and for that purpose, may even arm themselves; and that whatever is honestly done by them in the execution of that object, will be supported and justified by the law. But I expressed my opinion then, and I still think, that citizens using such force had better be assistant to the sheriff and public functionaries, than to assume such an urgent authority, except in cases of the extremest necessity. But if under proper circumstances, the law will extend to citizens the same indemnity in resorting to extreme measures for the suppression of dangerous riots, that it affords to officers acting for the like object, it will certainly extend no greater. How this authority is to be exercised by sheriffs, I have expressed in the opinion referred to, in these words: "When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore peace, and prevent criminal outrages against person or property. They may arrest rioters, or detain and imprison them. If they resist the sheriff and his assistants in their endeavour to apprehend them, and continue their riotous actions under such circumstances, the killing becomes justifiable." There is nothing here said or intended to convey the idea that a mere unlawful, or even riotous assembly, can be shot down by musketry without any previous effort being made to suppress it by less bloody and more pacific measures. It is when the conservator of the peace is contemned and resisted, and the law and its ministers set at defiance, that he is authorized to vindicate its majesty at all hazards. Riotous and turbulent as may have been the meeting on the 7th of May, in its organization in the Independence square, and its progress to the Washington market, no one, whether private citizen or public officer, would have been authorized to fire upon it until other means were resorted to for its dispersion; and necessities arose from the manner and extent of the resistance to such means, demanding extremities. The law recognises the existence of a necessity for the suppression of riot and rioters, by extreme means; but it is a necessity only justifiable in extreme cases. Where indeed, rioters exhibit a spirit that manifestly would mock expostulation; where they at once enter upon a predetermined work of destruction, and execute it under circumstances of violence and ferocity; and with the display of force, clearly manifesting that delay in action for the employment of remonstrances would be useless and pernicious, then such a mob may be regarded and treated as a common enemy.

But the demonstration on the Hibernia hose house and carriage, admitting it to have preceded any attack on the assembly in the market, presented no such contingency as justified the firing on the boys and men engaged in it. Before this, no felonious assault was made on any other property; none certainly, which called for or produced a fire on those perpetrating it. The attack on the hose house, and the removal of the apparatus for the purpose of its destruction, was the aggression followed by the firing. This was a gross trespass, deserving of severe legal punishment, but it did not justify the use of deadly weapons, which followed it, even by the owners of the property, much less by strangers at a distance from the scene of action; such as the armed occupants of Jefferson street, the Germantown road, and that vicinity. If death had followed that rash and wicked act, all the actors in it would have been guilty of murder at the common law certainly. But neither Matthew Hammitt nor any other individual, as far as the proofs are before us, was killed by this fire; and hence the legal liabilities incurred by those by whom it was perpetrated, are not the primary subjects for consideration in this investigation, although they may become matters of future examination. The true legal character of this act may be of importance in another view to be taken of this case hereafter. Hammitt was killed after the first attack, and after the friends of the meeting had rallied and commenced returning the assault of those who were guilty of the first illegal firing. Such a course was most natural under the circumstances, it is true. But nevertheless, was it legal? The law permits no man to be his own avenger. Vengeance belongs only to the Most High. Instead of such a movement, the injured parties should have appealed to the laws for justice and protection. The act went beyond the necessities of self-defence, which are limited to the immediate resistance of aggression. Should this right be conceded to the extent assumed, the wild ferocity of private vengeance would usurp the place of the public vindication of law; and social security and order would wither under the heated atmosphere of passion. I speak not now of the case of a lawful assembly, illegally attempted to be dispersed by force and violence, and persisting, in the face of such opposition, to maintain its right to assemble, at all hazards. That question is reserved for the occasion in which it shall arise. But the meeting of the 7th of May, we have said, was, if the defendant's testimony is believed, from its attending circumstances an unlawful assembly. This character was conceded to it by the Attorney General. It was unlawfully, indeed, assaulted, and if death had ensued, the assailants would have been guilty of murder. But an unlawful assembly, unlawfully assaulted and dispersed, has certainly no legal right to re-assemble with deadly weapons to attack and destroy those who have so assaulted them. By so doing, they are usurping the authority of the law. But if in the heat of excited passion consequent upon such wrong, they should "presently fetch their wea-

pons, and go into a field and fight," and in the combat one of the original assailants should be killed, it would only be manslaughter in them, because the law would presume their blood had never cooled since the first aggression. If the original assailants in this renewed combat should, without malice, kill any of the party so returning to the affray, they would be equally guilty of manslaughter; for they were the first aggressors, and the wrong done by them originally, led to the homicide. They occupy the position of one of the parties engaged in a mutual unlawful combat, where either of the contestants slaying his opponent is guilty of manslaughter.

The Attorney General has put the case in one point of view, which if sustained by the proof, would make the killing of Matthew Hammitt a murder of the first degree. He insists that the whole case shows an original and formed design in the defendant and his associates to disperse any meeting having for its object that contemplated by the meeting of Friday, the 3d of May, and to destroy and kill those concerned in it, if their object could be accomplished in no other way. He insists that the whole conduct of Daley and his associates manifests that such was their intention, and that the affair of the hose house was a mere pretext to cover a deeper and deadlier design. If you should believe that the arming and array in the vicinity of the market was really with this diabolical motive, and that the slaying of the deceased and all others who fell on that day was the product of such a design, and done in the consummation of it, then all those concerned in this deed, principals, aiders and abettors, are guilty of murder of the first degree; although Hammitt might have been guilty of manslaughter only, had he been the slayer. Whether the facts proved justify this inference, is for your decision, and yours only. The court distinctly leave that question exclusively to you, without designing in the slightest degree to interfere with your judgment.

Finally, the defendant's counsel, in their zealous and eloquent argument on the plea of justification, insisted that all the facts of the case show that the object of the assembly of the 7th of May at the market house, was to sack and destroy the houses, and injure and abuse the persons of those with whom the defendant was in connexion on that occasion—that they marched to the scene of contemplated violence with arms and banners displayed, threatening vengeance and destruction—that they actually assailed persons and dwellings—that the wives and children of the assailed were forced to fly for safety and protection to the highways, and to the hospitable roofs of the charitable—that if in their terror, they may not have measured the defence with the cool accuracy of a court and jury, secure in the dignity of their position, a slight excess should not change them from the condition of injured and persecuted men, vindicating the rights of humanity, into that of condemned felons. How far these positions are just inferences from evidence, is for your decision. If sustained, a case of justifiable self-defence would be made out.

In our opinion the indictment is sufficient, and under it you can convict the defendant of murder in the first, or of the second degree of manslaughter, or entirely acquit him.

I have now, gentlemen, given you the united views of the court as to the law of the case. It is for you to apply the facts to those principles, and render your verdict accordingly, always remembering that the dictates of your conscientious judgments should alone influence your conclusions.

COMMONWEALTH v. HARE.

ISAAC HARE was put upon his trial charged with the murder of Joseph Rice, during the riots in Kensington in May, 1844. The general nature of those outbreaks may be ascertained by turning to the case of Daley, reported in the preceding pages. The reference to the facts in evidence in the present case, contained in the subjoined charge, will suffice to show the defendant's participation. The following charge was delivered by King, president, who prefaced it by referring generally to the facts, out of which arose the legal principles contended for by the commonwealth and defendant respectively. After observing that it was not his intention to express any opinion upon those facts, but to leave them exclusively to the jury, he proceeded as follows:

The doctrines of the law may be thus summed up; and we desire you to receive them as our judgment on the principles which we think ought to guide your deliberations.—If from the proofs before you it has been made to appear that Hare, and others with whom he was in association, after the original assault on the meeting of the 7th of May, and the dispersion of that meeting consequent upon it, left the scene of action, gathered

arms and friends, and returned, and there commenced burning the houses and property of the assailants, and firing upon and killing, or endeavouring to kill them, for the purpose of avenging the wrongs they had suffered, and not for the purpose of arresting and bringing the original offenders to justice; then their conduct was illegal and unjustifiable, and they each and all are criminally liable for all the consequences flowing from such acts of unauthorized vengeance. The law does not and will not permit any individual or body of men to become their own avenger, and if they attempt it, and injuries to person or property follow, they are criminally responsible for their conduct. If courts of justice should once recognise this wild right of private vengeance, it is evident that the bands of social order and security would be torn asunder, and the cannon and the musket become the substitutes for the bench and the jury box, in measuring out the nature and amount of punishment to offenders against public law. The concession of such a right of self-vindication, would be the immediate and complete demolition of all public safety, the surrender of all the powers of government, and the termination of the supremacy of the law.

If any citizen or body of citizens are injured or aggrieved, the vindication of their infringed rights belongs exclusively to the civil government; and if they attempt to forestall the public arm and undertake to chastise those from whom they have suffered wrong, they are acting as much in opposition to public justice as the original aggressors. Let me not, however, be here misunderstood; I do not mean at all to question the sacred and unalienable right of self-defence; a right derived from the laws of nature, and superior to anything emanating from human lawgivers. By virtue of this inherent right, any man assailed by another, under circumstances manifesting an intention to take life, or do great bodily harm, may immediately resist the assailant, even unto death. He may even, under circumstances of urgent and manifest necessity, anticipate the blow of an assailant threatening such an attack, and strike him down before his deadly intention is followed by an actual assault. But when a man so assailed has retreated from the assailant, and is secure in his separation from farther personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new contest with the aggressor. If he does so, and slays him, he is guilty of murder or manslaughter, according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leaves the scene of outrage, procures arms, and in the heat of blood consequent upon the wrong, returns and renews the combat, and slays his adversary, both being armed, such a homicide would be but manslaughter. For the law, from its sense of and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind, smarting under the original wrong. And such I said in Daley's case was the position of any who, after the illegal firing on the citizens on the 7th of May, hastened and gathered friends and arms and returned to the scene of assault, having in view the destruction of those who were guilty of the outrage, if they subsequently killed any of the original aggressors. Parties meeting and entering into deadly conflict, under such circumstances, are all criminals—perhaps in different degrees, having regard to those who were the first and unprovoked assailants. And if human life is taken in such a combat, renewed by common consent, the slayer and all aiding, abetting, and assisting him, are at least guilty of manslaughter. Masses of men have no more right to engage in such general and mutual combat, than individuals have to array themselves against each other in private duel. If life is taken in either of these cases, the offenders, their aiders and abettors, are guilty of felonious homicide. The law does not stop to inquire into the relative merits of such violators of the public peace, but regards them all as obnoxious to censure and punishment.

If during such a scene of unlawful violence an innocent third person is slain, who had no connexion with the combatants on either side, nor any participation in their unlawful doings, such a homicide would be murder at common law in all the parties engaged in the affray. It would be a homicide, the consequence of an unlawful act, and all participant in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms between two bodies of enraged men should take place in a public street, and from a simultaneous fire, innocent citizens, their wives or children in their houses, should be killed by some of the missiles discharged—shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the

public highway of a thickly populated city, are they to have the benefits of impracticable niceties, in order to their indemnity from the consequences of their own conduct? Take the present case as exemplifying the effects of such a doctrine. Joseph Rice was killed within the enclosure of his house, at a time when the probabilities are that both belligerents were maintaining a desultory fire upon each other, and hence it becomes difficult to say with positive accuracy by which he was killed. Are the party at the market to escape the consequences of his death by raising a doubt whether a shot from their opponents at Jefferson street, Harmony court and the Germantown road, may not have killed him?—Such a doubt must equally enure to the benefit of those opponents, should they be placed on trial for the same offence; and between these doubts the life of a citizen is taken with impunity. Is it not both a juster and a wiser course to say that both were alike offenders when the homicide was perpetrated, and both are alike chargeable with its consequences? Is it not of the deepest moment to the future peace and safety of the community; is it not of all things that best calculated to prevent our streets from becoming, hereafter, bloody arenas, where enraged and lawless men shall settle their disputes with weapons of death, alike calculated to reach the combatant and the non-combatant; to at once declare, that for every drop of innocent blood shed in such a scene of outrage, every man who is taking a part in such an infraction of the law, is equally guilty? Such we believe to be the law, founded on the plainest reason, justified by the clearest expediency, and demanded by the most obvious necessity. A homicide committed under such circumstances would not, however, be a murder of the first degree, because there would exist no such malice as is required by our statute to constitute that crime. At common law such a homicide would be murder, reduced, however, by the act of 1790 to murder of the second degree.

But if one or more of the parties so engaged in an unlawful combat, deliberately fire at and kill an innocent third person, taking no part in the conflict, having no just reason to regard him as one of the belligerents, such killing would be murder of the first degree. It would present the case of a wilful, deliberate and premeditated killing, perpetrated with an instrument likely to take life, rendering the actual perpetrators guilty of the highest grade of crime known to our criminal code.—If the testimony, in your judgment, brings clearly home to the defendant such a charge, he should be convicted. If, however, the commonwealth has not fully satisfied your minds in the affirmative of this position; or if the proofs adduced by the defendant have rebutted this allegation, or thrown a fair doubt upon its certainty, then you ought not and cannot justly convict him of that part of the charge involving capital punishment.

The defence, besides denying the adequacy of the proof to establish the identity of the defendant, either as one of the parties actually killing Rice, or as being one of others acting in concert by whom he was killed, and assuming, for the sake of the argument, that Hare was present when he was so killed, insists that the killing was justified, first, as being done in self-defence; and second, as being done by those with whom Hare is said to have been associated in an honest endeavour to repress a dangerous and bloody riot, and to bring its perpetrators to public justice.—In order to raise the first point, it is argued that there was no cessation of the mutual firing between the combatants from the first onslaught; that Rice was acting with the original assailants armed and engaged in the firing, and that he met his death in the resistance made to the murderous assault committed by himself and his associates on the defendant and those united with him. If it is true that the attack with deadly weapons on the meeting of the 7th of May, was instantly returned by those unlawfully assailed; that they continued it in order to the preservation of their own lives, which, by no other practicable and reasonable means, could have been preserved, by reason of the sudden, fierce, and deadly nature of the assault upon them; if Rice was engaged in this assault, and fell from the resistance of the assailed, rendered absolutely and indispensably necessary, from the suddenness, violence and extent of the assault, a case of homicide in self-defence, and as such justifiable in law, has been made out, and the defendant is entitled to an acquittal. But still, if the return of the fire was not an immediate act; if the proof shows that the assaulted party retired, armed themselves, returned to the scene of original violence, and there voluntarily and without any necessity in order to the preservation of their lives, renewed the combat for the object of inflicting even what they supposed just chastisement on their opponents, the doctrine of self-defence has no relevancy to the case. The plea of self-defence rests on the natural right every man has to protect his own life against an unlawful assault upon it by another. If, however, when secure from danger, by his actual removal from the threatened assault, he voluntarily returns to meet his adversary, and renews the combat, it cannot be pretended he acts in defence of his own life against impending and inevitable destruction. He assumes, under such circumstances, a new character. He becomes a party voluntarily entering into an unlawful conflict, and is responsible for all the consequences following his new position. You are, however, the exclusive judges of the facts of this case, and if you are of opinion that Hare was actually present and participated in the affray that

led to the death of Rice, but are satisfied from the proof that a case of excusable self-defence has been made out within the principles of law, as expounded by the court, you ought to acquit him.

As to the second ground of justification assumed. In a previous case tried in this particular, nearly under the same facts, it was considered by us that the weight of the testimony established the first firing to have followed the attack on the Hibernia hose house and carriage; that this firing was unauthorized by law, under the facts disclosed in the evidence; and that if death had followed this fire, it would have been murder in those who were guilty of it. I then was of opinion, and so continue to think, that the weight of the evidence shows that the party on Jefferson street, Harmony court, and the Germantown road, were fully prepared for this fire before the meeting approached the Washington market. It is now urged that this assembly of armed men having illegally fired upon the meeting at the market, it was competent for all good citizens to endeavour to bring them to justice, and the doctrine of my charge to the grand jury is invoked as containing principles which would justify the assemblage of citizens, and even the use of arms, in order to bring such offenders to justice.

From no doctrines laid down in that charge are we prepared to depart, and the defendant shall have the full benefit of any of them which the facts of the case entitle him to invoke. Those doctrines were well considered, and will not be lightly changed. We there said "citizens may of their own authority lawfully endeavour to repress riots, and for that purpose may even arm themselves, and whatever is honestly done by them in the execution of that object, will be supported and justified by the common law. But, as was said then, it would be more discreet in such cases to be assistant on the justices and sheriff."—Undoubtedly, if the peaceable citizens of Kensington, after the meeting of the 7th of May, 1844, had been unlawfully assailed and dispersed, and assembled together for the purpose of restoring the public peace, and arresting the offenders by whom it had been broken, they might rightfully employ all the force necessary to restore order and bring the criminals to justice. But this kind of popular vindication of public law and order is most hazardous at best, and those who assume upon themselves public functions must be wary in the exercise of them. The law will justify what is "honestly done by such citizens," but nothing more. If, under the pretext of maintaining the public order, men become themselves infractors of it, they are really more worthy of punishment than the unequivocal offender, for they add hypocrisy to crime.

If, under proper circumstances, the law will extend to citizens the same indemnity in resorting to extreme measures for the suppression of dangerous riots, that it affords to officers acting for the like object, it will certainly extend no greater. How this authority is to be exercised by sheriffs, I have expressed in the opinion referred to in these words: "When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore peace and prevent criminal outrages against person or property. They may arrest rioters, detain and imprison them. If they resist the sheriff and his assistants in their endeavour to apprehend them, and continue their riotous actions under such circumstances, the killing them becomes justifiable." There is nothing here said or intended, to convey the idea that a mere unlawful or even a riotous assembly can be shot down by musketry without any previous effort being made to suppress it by less bloody and more pacific measures. It is when the conservator of the peace is contemned and resisted, and the law and its ministers set at defiance, that he is authorized to vindicate its majesty at all hazards.

If the sheriff and his posse engaged in suppressing a riot, should burn down private houses and public buildings; should array themselves in hostile conflict against the alleged offenders, and unnecessarily and wantonly take their lives, unquestionably their official character would operate in no other way than to increase the atrocity of the offence.—So, in this case if the citizens who assembled after the dispersion of the meeting of the 7th had not in view the vindication of the public law, and the arrest of the violators of the peace, but were really influenced by angry and revengeful feelings, which led them to engage in an open street fight, in order to punish the original aggressors, they never can be classed with the sheriffs and justices of the peace, and their assistants, engaged in suppressing great and dangerous riots. Nor can they claim the indemnity for extreme measures given by law to such public agents acting bona fide in the support of the public law.

If, however, the commonwealth has failed in proving Hare to have been present at the time of the conflict between the Jefferson street and Washington market parties, during which Rice was killed; or if the defendant's evidence has thrown a fair doubt on that fact, he is entitled to your verdict. And if from the evidence you are satisfied that Rice fell resisting the law, by hands of citizens, bona fide and honestly engaged in the endeavour to restore order and bring offenders to justice, and that such killing was necessary and indispensable, in order to accomplish these objects, and that Hare was really and truly engaged at the time as a good citizen, striving to maintain the supremacy of the

laws, he is equally entitled to your verdict. But if the testimony proves to your satisfaction that Hare and others, after the assault on the Tuesday meeting, retired and collected arms and men, returned to the scene of aggression, and in pursuit of satisfaction for the wrong done him and them, entered into a combat with the aggressors in the streets of Kensington, with fire-arms; and if, during the combat, Joseph Rice, an innocent and unoffending citizen, fell by a shot from any of those so unlawfully engaged, it is murder of the second degree, in Hare and all others engaged in the unlawful acts which resulted in his death. It is also important for you to understand, that under this bill you may convict of murder of the first or second degree, or of manslaughter, or you may generally acquit. The facts of the case are for your exclusive consideration. We give no opinion upon them, contenting ourselves with declaring principles, leaving their application to the facts to you, to whom this important branch of public justice pertains by the constitution and laws of the commonwealth.

COMMONWEALTH v. SHERRY.

Before Mr. Justice ROGERS of the Supreme Court of Pennsylvania, at a special Court of Nisi Prius, held at Philadelphia, in April, 1845.

This, and the then undisposed of cases arising out of the writs of 1844, having been removed to the Supreme Court by certiorari, a jury was called on the 29th of April, 1845, the defendant pleading not guilty. Three days were occupied in calling a jury, in the course of which the following questions were put by the counsel for the defendant.

Question.—Could you conscientiously agree to a verdict of murder in the first degree, death being the punishment?

Answer.—I am conscientiously scrupled against the death punishment, and against anything that would involve it; though if I was sworn in a case, I might be forced to convict if the evidence required it, though against my scruples. The court held that the juror must be excused.

Q.—Have you formed or expressed such an opinion as to the comparative merits of the controversy in Kensington, as would affect your action as a juror?

A.—I have. The court held the juror incompetent.

Q.—Have you formed or expressed an opinion as to the guilt or innocence of either of the parties in Kensington?

A.—I have. The court held the juror incompetent.

A jury having been at last obtained, the commonwealth's case was opened by Mr. F. Wharton, assistant Attorney General. A series of witnesses were then examined, who testified to the same general outline of facts as was detailed in the case of John Daley, a summary of which has been already given. Great doubt existed, however, as to the personal participation of the defendant in the affray, and in consequence of the lapse of time, and the general softening of partisan temper, the evidence on both sides harmonized much more readily than on the earlier trials.

After the evidences were through, the jury were addressed by Mr. Wharton and Mr. Kane, Attorney General, for the commonwealth, and by Mr. H. M. Phillips and Mr. D. P. Brown, for the defence.

Judge Rogers charged the jury substantially as follows:¹—

You are, it is true, judges in a criminal case, in one sense, of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. The popular impression is, that this power to definitely close a prosecution by an acquittal, arises from a right on the jury's part to decide the law as well as the facts according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law, that no man can twice be put in jeopardy for the same offence. No matter from what cause an acquittal results, the defendant cannot be retried. If, for instance, it should result from a usurpation by the court of the facts of the case, which undoubtedly belong to the jury, the acquittal would be final; and yet it would be very improper to draw from such a result the assumption that the disposition of the facts belongs to the court. It is important for you to keep this distinction in mind, remembering that while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid

¹ This charge was noted by the editor at the time, and is now reported from his notes.

down by the court. The sanctity of your conclusions in case of an acquittal, arises not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence, a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the Attorney General. You are bound, notwithstanding this, to conform your verdict to the law of the land, in the same way that the two latter functionaries are bound to conform their conduct to the same standard; for it would be productive of the wildest consequences to establish the principle, that any officer whatever, in a criminal case, should be relieved from the restraint of the law as settled in a uniform system by the supreme authority. For your part, your duty is to receive the law for the purposes of this trial from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or an acquittal against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury. My duty is, therefore, at the outset, to charge you, that while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the court.

The learned judge after recapitulating the testimony, thus proceeded:—

Resolving this into its elements, and stripping it of party names and badges, we have the spectacle of two factions arrayed against each other, in a bloody contest for supremacy. It is not the ordinary case of a riot, in which the government is on one side and a mob on the other. Here there was no political question whatever leading to either insurrection or uproar. Neither side moved with the purpose of effecting any public object by an agitation against government, though each in turn, as it came in conflict with the public authorities, chafed against the hand that sought to restrain it. The difficulties originated in a street fight between two distinct interests of society, comprising on the one side a portion of the Irish Roman Catholics, and on the other, the Irish Orangemen, together with such portions of the American population as sympathized with them. It is true, that subsequently, when the latter interest preponderated, and proceeded to destroy the churches and other public buildings of their opponents, the civil and military authorities, as well as the friends of good order generally, arrayed themselves on the side of the former. But this was for a temporary purpose only, disconnected entirely with the partisan conflict. At the period which concerns this trial, as well as generally throughout the riots themselves, the only thing that the law knows, is, that there were two distinct and lawless parties, who undertook to settle private and social grievances which they had against each other, by a resort to fire-arms in the public streets.

What, then, is the law in such a case? I say unhesitatingly, the law is, that if in such a conflict, death ensues, all parties are guilty of murder at common law. They are engaged in an unlawful design, which is the first ingredient of murder, and it is only necessary to consummate the offence, that death should be the consequence. It is not necessary, in order to charge a particular offender, that he should be proved to have fired the particular gun, or discharged the particular missile, that caused the fatal wound. In the contemplation of the common law, where a mob of ten thousand is engaged in an unlawful design, and one of them, not out of special malice, but a general design to do harm, fires a gun, they all are to be considered as having pulled the trigger. But while such is the common law, the Pennsylvania act of 1794, by creating a distinction between murder with a specific intent to take life, and murder without such intent, has established a test, which it becomes your duty in the next place, to consider. The reason of the establishment of the new grade, undoubtedly was the inhumanity of attaching capital punishment to anything under an actual and specific intention to take life. Was there such an intent here? It is for you to say whether the parties who formed the mob, or either of them, were actuated by so incredibly malignant a temper. It will be well for you to consider, whether the object of such outbreak and of such intent, was not rather to humble than to slay an adversary; rather to chastise than to annihilate. But be this as it may, I charge you that no special malignity on the part of an individual or individuals, against a specific object, can affect his associates with the grade of the guilt incurred by himself. They are answerable for the common design of those with whom they associate; not for the private design of individuals. Should you find that the object of the conflicting parties in the riot in which the deceased found his death, was merely to humble and repulse each other—should you reject the theory that their object was death and annihilation—then your finding will be for murder in the second degree.

The next inquiry for you will be whether there was such provocation towards the defendant, or the party of which he was a supposed ingredient, as to lower the offence to

manslaughter. Was the homicide both conceived and committed in hot blood? Was it throughout, the result of passion induced by an adequate exciting cause? If so, the offence is manslaughter, provided two qualifications are understood. In the first place, no breach of a man's word; no mere trespass on his lands or goods; no insults by words, however irritating, will form a sufficient provocation. In the second place, even where the provocation was originally adequate, if the party offended withdrew, and then, after having had time to cool, procures weapons, and having fetched them to the scene of conflict, kills his assailant, the offence is murder, subject to the limitations as to degree which I have already mentioned.

It becomes necessary for me now only to advert in conclusion to the state of facts which will be necessary to sustain an acquittal on the ground of necessary homicide. A man when driven to the wall by an assailant, who to all appearances intends to take his life, or do him grievous bodily harm—whose house is attacked by armed men, —or who has no other means of resisting the commission of a felony on himself, his family, or his property—may take the life of his assailant. You must recollect, however, that a defence such as this, as well as that of provocation, must be proved to your satisfaction, the burden being on the defendant.

The defendant was acquitted, it being understood that there was a defect of proof as to identity.

STEAMBOAT NEGLIGENCE.

TRIAL OF THE OWNERS AND OFFICERS OF THE HENRY CLAY.¹

(UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.)

THE UNITED STATES *v.* Thomas Collyer, §ths owner; John F. Tallman, captain; John Germaine, 1st engineer; Edward Hubbard, 1st pilot; James Elmendorf, 2d pilot; James L. Jessup, captain's clerk; Charles W. Merrit, oiler, charged as 2d engineer.

The lamentable accident wherein the steamboat Henry Clay was destroyed on the banks of the Hudson river, and about eighty-five lives destroyed, is of too recent occurrence to need any particular recital of the same to bring it to the memory of our readers. This vessel started from Albany about 7 o'clock, A. M. on the 28th July, 1852, with a large load of passengers and freight, bound for New York, to stop at most of the intermediate landings, and there to receive and land passengers and freight. The steamboat Armenia started from the same place bound on a like voyage, with a smaller load of passengers at about the same hour. It was alleged that shortly after starting from Albany, and somewhere in the neighbourhood of Hudson, which is thirty miles below Albany and about one hundred and seventeen miles from New York, a contest of speed arose between the two boats, wherein the greatest exertion was made use of by the two boats to surpass each other in speed. The result of this contest was, that at a point a little north of Kingston, the two boats came in collision, and it was alleged and believed by the public, the Henry Clay endeavoured to crowd the Armenia on shore. This contest created excessive alarm on the part of the passengers, especially the females on board of both boats. It continued until about Kingston, whereat the Armenia hove to for the alleged purpose of cooling her boilers and engine, which it was averred were overheated; but nevertheless, after a time the Armenia followed the Henry Clay, which latter proceeded on her course down the river, but with diminished speed, until her arrival in the vicinity of the Forrest House, two miles below Yonker's, and about fifteen miles from New York, when fire was discovered proceeding up from the fire room; attempts were made to put it out but without success, and finally the vessel was headed to the shore, and was beached, but unfortunately the progress of the fire was such, that most of the passengers were prevented from reaching the shore by the fire intercepting their passage through the gangways and over the promenade deck. They were gradually driven off the stern of the boat by the devouring flames, and all, or nearly all, who were at the stern perished. On the voyage down, it appeared that the captain was confined to his state-room from sickness, occasionally giving an order. It was alleged that Collyer, who was principal owner of the boat and who was on board, was in command, or had the principal charge and direction of the boat. The other officers were at their posts and remained so until the vessel was beached, when they rushed in and en-

¹For this valuable report the editor is indebted to D. M'Mahon, Esq., of the N. Y. Bar.

deavoured to save the lives of the passengers, who were drowning. Many of them were saved by their exertions. It appeared also, that before the boat reached the shore, numbers of the passengers plunged into the river, and the master of a boat who was near at hand went to their assistance and saved a few; many of them, however, were drowned. Complaint was made in the public press, also, against the pilot of the boat, because of his beaching his boat at right angles to the shore instead of an oblique position; if the latter had been done, it was maintained that all might have escaped. Much indignation was expressed at an order which was said to have been given to the passengers by some one in authority, just before the vessel reached the shore, for them to go aft, which order was generally obeyed, and many of them who went aft were consequently destroyed. It was also charged that the vessel was insufficiently provided with boats, water buckets, life preservers, and pumps; that if the vessel had been so furnished, all, or nearly all would have escaped, or the flames would have been mastered. A coroner's inquest was held at Yonker's, a place about three miles from the place of the calamity, and was in permanent session for about ten days after the event, whereat evidence was taken of a very exciting and inflammatory nature. In New York, Dutchess, and West Chester counties, the Grand Juries of those counties were respectively charged by the Judges of the Supreme Court, to take action in the premises. But the United States Courts first proceeded and arrested the principal owner, Collyer, and the others above named, on the day of August, 1852, and held them to bail in \$10,000 to answer any indictment which might be found against them, under the section of the act of Congress of 1838, which is as follows: "That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court in the United States, shall be sentenced to confinement at hard labour for a period not more than ten years. After their arrest at the instance of the United States Courts, and bailing out as above stated, the West Chester authorities, on the finding of the coroner's inquest, preferred a complaint against them for murder, under the following section of the New York Rev. statutes, viz. 2 Rev. stat., p. 843, sect. 5, 4th ed. Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases:—1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being. 2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony.

The defendants were arrested and held in custody by the sheriff of West Chester county, but before they could be removed to West Chester county, a writ of habeas corpus was sued out at the instance and on the petition of Dennis M. Mahon, Jr., who appeared as counsel for all except Collyer. This habeas corpus was argued and discussed before his Honour, Mr. Justice Edmonds, in the month of September, 1852, by Mr. M. Mahon, for all the defendants excepting Collyer, by Mr. Cutting and O'Conner for defendant Collyer, and by the District Attorney, Wells, of West Chester county, and Mr. Lockwood for the State authorities. The argument and decision were fully reported in tenth vol. Legal Observer, p. 298, to which we refer our readers. The learned judge overruled the charge of murder, but held them to answer on the charge of manslaughter in the first degree, and held them in bail in \$10,000. Shortly after this decision, the Grand Jury summoned to the United States District Court in New York, found an indictment for manslaughter against all the defendants, under the aforesaid section of the act of 1838. After the finding of this indictment, anoyer and terminator was subsequently held in West Chester county, by the State Court, and an indictment was there found against all the defendants for manslaughter in the first degree. To this indictment the defendants, Tallman, Germaine, Hubbard, Jessup, Elmendorf, and Merrit, pleaded to the jurisdiction. To that plea the District Attorney demurred. The other defendant, Collyer, pleaded not guilty. The argument of the demurrer to the plea of jurisdiction was never brought on for argument, the State authorities concluding to await the issue of the trial on the United States indictments. The plea was as follows:—In the Court of Oyer and Terminer held in, and for the County of West Chester. The People, &c. v. John F. Tallman, James L. Jessup, John Germaine, Charles Merrit, Edward J. Hubbard, James Elmendorf, imp'd. with Thomas Collyer. And the said defendants impleaded as aforesaid, come into this Court of Oyer and Terminer, held in and for the County of West Chester, and having heard the indictment now here read, say that the said Court of Oyer and Terminer ought not to have or take cognizance of the said offences in the said indictment, against them preferred, because protesting that they are not guilty of any of the said offences, they say that the same were committed on the waters of the Hudson river, near Yonker's,

and within the county of West Chester, within the ebb and flow of the tide. And they aver that at the several times when the said supposed offences set forth in the several counts in the said indictment, were as therein alleged committed, the said John F. Tallman, was captain or master of the steamboat or vessel, hereinafter named, and the said John Germaine was engineer thereof, and the said Edward Hubbard was pilot thereof, and the said James L. Jessup, Charles Merrit, and James Elmendorf were persons respectively employed on board thereof. And the said steamboat, Henry Clay, was at the several times when the said supposed offences, set forth in the several counts of the said indictment, were as therein alleged committed, a vessel propelled in whole or in part by steam, duly enrolled and licensed under the enrolment and navigation laws of the United States of America, and engaged in the navigation of the navigable tide waters of the Hudson river, between the cities of Albany and New York, stopping at the intermediate places on said river, at and above Sing Sing. And the said several persons mentioned in the several counts of the indictment now here, whose lives, as therein alleged were destroyed, were persons respectively on board of said vessel at the time of the commission of the said supposed offences. And they aver that the said supposed offences were committed after the 7th day of July, A. D. 1838, to wit at the several times in the several counts of the said indictment declared. Wherefore they say that the Circuit Court of the United States, within, and for the southern district of New York, had at the several times when the said supposed offences set forth in the said several counts of the said indictment were as therein alleged committed, and have now the sole and exclusive right to entertain cognizance of, and jurisdiction over the offences in the said indictment described and set forth, and this they are ready to verify. Wherefore they pray judgment whether the said Oyer and Terminer ought and will further proceed against them. D. M'Mahon, jr., Attorney for defendants Tallman, Jessup, Hubbard, Germaine, Elmendorf, and Merrit.

State of New York, City and County of New York.—John F. Tallman, James L. Jessup, Edward Hubbard, John Germaine, James Elmendorf, Charles Merrit, being duly sworn, say that the aforesaid plea is true in substance and matter of fact. Sworn to before me this 25th day of November, 1852, John Germaine, ALLEN HANDHURST, *Justice of the Peace*. Sworn to before me this day of December, 1852, by Benedict Levis, jr., Commissioner of Deeds, John F. Tallman.

In January, 1853, the defendants, Tallman, Germaine, Hubbard, Elmendorf, Jessup, and Merrit, were called upon to plead to the United States indictment, when their counsel made a motion to quash the indictment, on the following grounds, namely:—1. That the indictment was defective in form.—2. That the first, second, third, fourth, fifth, sixth, seventh, thirteenth, fourteenth, and fifteenth counts were defective in form.—3. That the different counts of said indictment, charge the offence in the words of the statute, without setting forth with sufficient minuteness, the offence and the circumstances constituting the same. 4. That it does not charge the offence as having been committed knowingly or feloniously, or with intent to injure any person on board the vessel.—5. All the counts want the fulness and precision required by law in describing a criminal offence, and connecting any person with it. 6. It does not describe any of the defendants as having been engaged in the actual navigation of the vessel at the time the lives were lost; nor does it describe that their duties were such as that a neglect thereof, or inattention destroyed the lives. It indicts jointly for the same offence, in the same count, several different defendants, occupying different stations of employment on the boat, for a negligence or inattention to, and a misconduct in executing their respective duties, without showing how, or in what manner their different acts were joint in bringing about directly the destruction of the lives alleged to be lost.

The following is a synopsis of the indictment in question:—First count, That Collyer, Tallman, Germaine, Hubbard, Jessup, Elmendorf and Merrit, on the 28th day of July, 1852, on the navigable waters of the United States, and within the ebb and flow of the tide on the Hudson river, &c. were persons employed on board of the Henry Clay, propelled by steam—which vessel was then owned by persons, citizens of the United States unknown, and did then, and there, by their misconduct, negligence and inattention to their several and respective duties, in their several and respective employments on board of said steamboat, cause the lives of Stephen Allen, Abraham Crist, A. S. Downing, Geo. F. Whittock, Julia Hoey and divers other persons then being on board, to be destroyed.—Second count, That the same persons on the 28th July, 1852, on the Hudson river, &c. were persons employed on board the steamboat Henry Clay, which was then owned by William Radford, Thomas Collyer and John F. Tallman; and did then, and there, by their misconduct in their several and respective employments on board of said vessel, cause the lives of Stephen Allen, &c., and others unknown, on board of said steamboat Henry Clay, to be destroyed.—Third count, Same as second count, except it uses the word negligence instead of misconduct.—Fourth count, Same as third count, except it uses the words of the statute, viz.: inattention to their several and respective duties in

their several and respective employments.—Fifth count, That said persons, &c. on the 28th July, 1852, in the navigable waters of the U. S., and within the ebb and flow of the tide, that is to say, on the Hudson river, in the southern district of New York, were persons employed on board of a steamboat propelled in whole by steam, called the Henry Clay, that is to say, Thomas Collyer, as part owner, and acting for the Captain in command of the boat, Tallman as captain, Germaine as engineer, Hubbard as first pilot, Jessup as clerk, Elmendorf as second pilot, Merrit as a-sistant engineer of said boat, which was then and there owned by Thomas Collyer, William Radford, and John F. Tallman, citizens of the United States, and did then and there by the mis-conduct of the said persons in their several and respective duties, in their before mentioned and described employments, on board of said steamboat Henry Clay, cause the lives of Stephen Allen, Abraham Crist, and divers other persons unknown, on board thereof, to be destroyed.—Sixth count, Same as fifth count, except it uses the word negligence.—Seventh count, Same as fifth count, except it uses the words of the statute thus: “By the inattention of them, &c. to their social and respective duties, in their before mentioned and described employments,” &c.—Eighth count, That said persons, on the 28th July, 1852, on the river Hudson, commonly called the North river, within the ebb and flow of the tide, and within the southern district of New York, &c. being then and there, persons employed in the following capacities, that is to say, Collyer as part owner in command, the said John F. Tallman as captain, the said John Germaine as engineer, the said Hubbard as first pilot, Jessup as clerk, Elmendorf as second pilot, Charles Merrit as assistant engineer, on board of a steamboat propelled in whole by steam, called Henry Clay, not regarding their several and respective duties, in their aforesaid respective capacities, did then and there, by inattention to their said duties, so negligently navigate, control and steer the said steamboat, called the Henry Clay, as to cause one Julia Hoey, then, and there, being a passenger on board said steamboat Henry Clay, to be overwhelmed by the waters of the said river Hudson; and in, and by said waters she was drowned, and did die; and so the jurors say, that the said Thomas Collyer, John F. Tallman, &c. the life of the said Julia Hoey by their negligence and their inattention to their said several duties, feloniously did destroy, &c.—Ninth count, Same as eighth count, except it charges “So inattentively navigate and manage the said steamboat Henry Clay, and manage and regulate the steam and furnace on board said steamboat, as to cause the said steamboat to take fire; by means whereof, Stephen Allen and Abraham Crist, and divers other persons were overwhelmed,” &c.; and charges that the lives of said Allen, &c. were destroyed by the inattention of the defendants to their several duties as aforesaid.—Tenth count, Same as last count, excepting it calls Collyer “acting captain.” It uses the words misconduct and negligence, and by inattention to their respective duties; and so inattentively manage, regulate, and conduct the fires and steam on board said Henry Clay, as to cause her to catch fire, whereby they were cast and thrown from, and out of the steamboat into the water of the Hudson river; and that by their misconduct and negligence, and inattention to their respective duties, the lives of the said persons were destroyed.—Eleventh count, Same as tenth count, except it uses the words, “feloniously disregarding their respective employments, did so negligently and inattentively navigate, control, and manage the steamboat Henry Clay, and so negligently and inattentively manage and regulate the fires and steam, &c.,” which said steamboat was then and there under the guidance and control of the said defendants, that by their misconduct and negligence, the said lives were destroyed.—Twelfth count, Same as eleventh count, except it uses the words “by misconduct and negligence, and by inattention to their respective duties as aforesaid, so inattentively manage, navigate, and control the said steamboat Henry Clay; and so inattentively manage, regulate, and control the fires and steam on board said steamboat Henry Clay, as to cause said steamboat to take fire, by means whereof one Inock Simons, then and there being on board, was burned, and from such burning died; and charges his destruction to their misconduct and negligence, and inattention to their respective duties.”—Thirteenth count, Same as second count, except it charges the life of Inock Simons to be destroyed.—Fourteenth count, Same as last count, except using the word negligence instead of misconduct.—Fifteenth count, Same substantially as fifth count, excepting it charges the death of Inock Simons, having been caused by fire, by reason of their inattention to their respective duties.

Argument was heard at great length on this question, before his Honour, Mr. District Judge Betts, and a similar case, that of the Reindeer, was heard at the same time. In the latter case the defendants had pleaded to the indictment, but having faith in Mr. McMahon's motion, united with him in it on the part of their clients.—The following are the arguments of the defence, and of the U. S. on that motion. Mr. McMahon, for the six defendants above named agreed:

I. The Circuit Court of the United States of America has no jurisdiction of the offences described in the indictment, because—1. It describes the offence as having been committed on the Hudson river. The court can take judicial notice that the Hudson river ends at

New York Bay, all above New York Bay, is entirely within the limits of the State of New York. *Peyton v. Howard*, 7 Peters, 322.—2. In *U. S. v. Bevans*, 3 Wheat. p. 336, it was decided that the courts of the United States have not jurisdiction of offences under the admiralty, until Congress have legislated on the subject.—3. Congress have no right to legislate respecting offences committed on navigable waters, entirely within the limits of a State; and the Hudson river is a navigable stream, entirely within the limits of the State of New York. The jurisdiction of the State of New York, extends to low water mark on the Jersey shore. *Commonwealth v. Peters*, 12 Metcalf, 187, 12 Howard's Reports, p. 443.—4. The act of 1838 does not in terms extend the jurisdiction of the U. S. courts to the navigable waters wholly within a state. It merely authorizes the general admiralty jurisdiction to apply to take cognizance of what it describes to be an offence, and the general admiralty jurisdiction does not apply to waters within the body of a county, or *fauces terræ*. *U. S. v. Wildbore*, 5 Wheat. p. 76, 103 and 104, S. C. Crimes, Act 3 March, 1825; 30 April, 1790, sec. 12, 5 Mason's Reports, p. 290.—5. The court should be extremely chary of extending the act, to apply to offences committed on the Hudson river, because if the admiralty has jurisdiction it is exclusive, and is a serious attack upon the rights of state sovereignty. This point is pressed in sober earnestness, as it happens that both the state, county, and the United States courts have here assumed jurisdiction, and intend to exercise it.

II. This indictment is defective in form, and describes no offence whatever.—1. It follows the words of the statute of 1838, in describing the offence without stating in what way the defendants were guilty of misconduct, negligence or inattention to his, or their respective duties, or what were the respective acts of misconduct, negligence or inattention constituting the offence. In any event, the first, second, third, fourth, fifth, sixth, seventh, thirteenth, fourteenth, and fifteenth counts are bad for that reason.—2. The offence being a felony, such a particularity is required, both at common law and by the decisions of our courts. 1 Chitty's Cr. Law, sec. 22, Arch. 50 and 64, Starkie's Cr. Pl., 235; *Regina v. Barrett*, 2 Car. & Kir. 343; Carr. & Payne, 156; *U. S. v. Mills*, 7 Peters, 142; *State v. Raines*, 3 McCord's Rep. p. 533; *Hampton's case*, 3 Grattan, 590; *Commonwealth v. Stout*, 7 B. Mon. 247; *People v. Allen*, 5 Denio, 74, 76.—3. As the terms misconduct, negligence or inattention are very broad and indefinite, by the use of them alone, no indication is given to the defendants of what they are guilty, and to meet such a charge they must be in great danger of conviction, because of their not knowing what description of misconduct, negligence, or inattention, they are to combat. *Regina v. Barrett*, 2 Carr. & Kir. 343; *Tennessee v. Fields*, Martin & Yerger, Rep. 137.—4. The offence is not set forth as having been committed feloniously, or with intent to injure any person or persons on board said vessel. Arch. Cr. Pl. 64.—5. It sets forth that the misconduct, negligence or inattention to their respective duties, &c. caused the lives of, &c. to be destroyed, with showing that such acts directly destroyed the said lives; and under the principle of *causa proxima non remota spectatur*, the indictment shows no offence under that statute. *Howell v. Commonwealth*, 5 Gratt. 664; *Anthony vs. the State*, 13 S. & M. 263.

III. The indictment is defective in substance because,—1. It indicts jointly for the same joint offence in the same count, several defendants occupying different stations of employment on the steamboat, for a joint misconduct, negligence or inattention to their respective duties, without showing that their acts were jointly destructive of the lives of those on board, or became, or were joint in their commission.—2. The statute of 1838 under which this indictment is framed, does not contemplate a joint negligence, because the phrases of the act are disjunctive, or distributive, thus, every captain, &c. by whose misconduct, negligence or inattention, respecting duties, &c.—3. The words misconduct, negligence or inattention, mean omission or ill conduct that is passive; action is not implied; the terms amount to an absence of will in what they do or omit to do, because if there is will, then malice would be inferred, and they would be guilty of murder. If no will, then there is inertness of the mind, which in each one is separate, because the inertness of the mind of the captain is different from the inertness of the engineer, their duties being distinct, and the exemplification of that inertness being different. The captain's misconduct, negligence, or inattention has reference only to his respective duty as captain; so with the engineer, with the pilot, and so with the others; each is guilty in his respective sphere; their guilt is different, and the manifestations of that guilt are different, and in no sense are their acts or causes conducing to those acts joint. Where several commit a joint act not of itself illegal, but which becomes so by reason of some circumstance applicable to each individual, severally and not jointly, they must be indicted separately. 2 Hawk. Ch. 25, sec. 89; *Barbour's Cr. T. p. 338*. Thus several partners cannot be indicted jointly, for exercising their trade without having served an apprenticeship, 1 Salk. 382; 1 Strange, 623; and 2 Strange, 921; *Barbour's Cr. T. 338*; 4 Burrough, 2, 46. When several persons are engaged in publishing a libel, and the publication of each be separate, they must be severally indicted, *Barbour's Cr. T. 338*. So on a joint *ch.* int act of receiving must be proved. Proof

that one received in the absence of the other, and afterwards delivered to him, will not suffice. *Rex. v. Messingham, Ryan & Moody*, C. C. p. 257. See *Russ. & Ryan*, Reserved 344, see *Vaughan v. the State*, 4 Miss. 530; *Weinzorpflin v. the State*, 7 Black. 186.—The motion to quash is the proper way to moot these points, for if the matters alleged in the indictment are not punishable by law, the indictment will be quashed. *Wharton's Cr. L.* 131, *Arch. Cr. L.* 64. So the court may quash in its discretion, for such insufficiency as will make any judgment erroneous, given upon any part of it against the defendant. *Betts, J. in U. S., v. O'Sullivan*, 9 Leg. Obs. p. 259, citing authorities *U. S. v. Goodwin*, 12 Wheat. p. 460.

The United States District Attorney, Mr. J. Prescott Hall, in rising to oppose the motion to quash the indictment in this case, said, that he should not consider it any part of his duty to occupy much of the time of the court in discussing the exceptions taken to the indictment, because he knew his honour was familiar with the law and the principles laid down in several discussions in similar cases. Knowing the judge's general preparation in all matters, he would merely state, first, in answer to the objections as to jurisdiction, that the law was sufficiently explicit in bringing this offence within the terms of the act of Congress, and that the objection was at an end, provided there is nothing in the law inconsistent with the Constitution of the United States. The learned counsel then referred to the act providing for the better security of the lives of passengers on vessels which are propelled in whole or in part by steam. Twelfth section provides, that every captain, engineer, pilot, or other person employed on board any steamboat, by whose misconduct, negligence or inattention, life is destroyed, shall be deemed guilty of manslaughter. Yet it may be, that Congress had no right to pass the law; if so, there would be an end to the question: but he, the District Attorney, took it for granted, that no Court at Nisi Prius would take upon itself to assume that Congress had violated the Constitution of the United States, unless it clearly appear that it had done so. It would be enough for him (Mr. Hall,) to show that Congress have that authority, not only by the words of the Constitution, but by express adjudications of the Supreme Court. It does not follow as a logical deduction, that because the states have jurisdiction over certain crimes, Congress, therefore, has not. It does not follow that because Congress has jurisdiction over certain crimes, the states have not. The District Attorney then referred to the case of *Fox*, charged with counterfeiting, reported in 5th Howard, p. 434, and remarked that his honour, Judge Betts, had given the same construction to the act concerning the counterfeiting of coins, which had been put upon it by the Supreme Court of the United States, in *Marigold's case*, 12 Howard, p. —, even before that case was decided, the Supreme Court held, in those cases, that although the states might have jurisdiction over certain crimes, yet, that Congress might also exercise the same power in cases within their jurisdiction. In relation to the matter now before the court, he submitted that it was not important whether it was exclusively under the authority of Congress or not: it is part of that jurisdiction in which is included the power to regulate commerce, and that also includes the power to regulate navigation. If Congress had the power to regulate navigation, they have the right to regulate it everywhere. The power extends to the land as well as the sea. As to the point about the flow and ebb of the tide, that has been long since exploded. He referred to the case of the *Ohio bridge*, in which it had been decided that the admiralty power extends to the lakes, and the power of Congress extends to the land as well as to the sea, in matters of commerce. It is a question of power, not of discretion. If Congress have a right to regulate navigation, there is no limit upon their discretion. It is for Congress to say how, and in what manner, the regulation shall be made and exercised. But this is not a matter open for construction. The Supreme Court has expressed its opinion upon this very act, and has decided that it is applicable to all steam vessels, whether navigating the rivers, the ocean, or the lakes; and that its commands must be obeyed by all persons within its description and enumeration. The District Attorney here cited and commented at great length upon the following cases, which he insisted had set the matter of jurisdiction at rest. *New Jersey S. N. Co. v. Merchants' Bank*, 6th Howard, 394; *United States v. Coombes*, 12th Peters, 72; *Waring v. Clark*, 5th Howard, 461-465. In this last case, the Supreme Court say that the act of July 1838, in all its provisions, is obligatory upon the owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a state or between states. Then as to the forms of the indictments, the District Attorney insisted that they were sufficient in all particulars, and conformable not only to precedents, but to express adjudications. In setting forth a crime created by statute, it is sufficient to describe the offence in the words of the statute itself, and this rule has been followed in some of these counts; while in others, the particular mode in which the terrible calamity overwhelmed men, women and children, in one common ruin, are particularly set forth. In some counts, death is attributable to the direct action of fire and steam; in others, water, in which the sufferers sought refuge to escape the still more dreadful ravages of flame. The District Attorney then commented upon the objection made that there could be no

such thing as joint negligence, and insisted upon it, that in practice, such inattention might exist, as in cases where two men are stationed at one point to keep common watch, and both neglect their common duty by gross acts of negligence. But in this case joint misconduct is charged, and in the Henry Clay's case the indictment sets forth that he, Collyer, the owner, was acting as master, that the captain was also acting in conjunction, not only with him, but with the engineer, pilot, clerk, and others of the crew; that all these were acting together, each in his own department, the object being to surpass the Armenia in speed; that each and all were reckless, and that the consequence of this recklessness was the burning of the boat, and the destruction of her passengers. He insisted, therefore, that both in theory and in practice, the indictments were good, and ought to be sustained, and he cited and commented upon many cases in support of his positions. The argument of the District Attorney occupied upwards of two hours.

Mr. M'Mahon replied on the part of his clients. In the course of his argument, the judge interrupted him, saying, that he would not take into consideration the question whether the law was unconstitutional. The only question he would entertain, was whether this court had jurisdiction in the matter.

Mr. M'Mahon then continued his argument, and was followed by Mr. Noyes on behalf of the parties implicated in the Reindeer catastrophe. The court then adjourned, the judge reserving his decision until morning.

The court, after advisement, delivered an oral opinion, in which he considered at some length the objections, but finally overruled them, and ordered the defendants to plead to the indictment.¹ The defendants all plead not guilty. After several continuances, the indictment came on to be tried at the October Circuit Court, before his honour Charles A. Ingersoll, sitting in the place of the present court, under the act of Congress, and a jury.

Mr. D. M'Mahon appeared for defendants Tallman, Jessup, Elmendorf and Meritt. Mr. Henry G. Wheaton for Germaine. Mr. George N. Betts and Mr. Ambrose L. Jordan for Collyer.

Mr. J. Prescott Hall, late District Attorney, and Mr. Dunning, for United States.

The prosecution moved on the trial of the defendants together. The counsel for the defence, on affidavits, asked for separate trials, principally because the defence of the defendants were antagonistical to each other, and that no fair trial could be had of all the defendants together, and that the evidence of the defendants were reserved for each other. This separate trial was opposed at much length by the prosecution. After a long discussion, Judge Ingersoll decided against the separate trial, remarking as follows, viz. :—

It appears to me that a great many topics have been discussed here which it is unnecessary to consider in disposing of this motion. They will properly be considered when the case goes to the jury; and as to what weight will then be given to them, under the instruction of the court, I do not think it necessary to intimate an opinion. The act of Congress provides "That every captain, engineer, pilot, or other person employed on board any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life of any person or persons may be destroyed, shall be deemed guilty of manslaughter." Now, the indictment at present under consideration, is founded upon this act of Congress, and it charges the individuals named in it of this misconduct and negligence. It charges them with a joint misconduct, and that by such misconduct and negligence they are all liable. It is not necessary for me to determine any questions which may have been had up before Judge Betts, heretofore, or to intimate what I think of his opinions; but undoubtedly I should have concurred in his opinion, after due consideration had by me. The question now is, whether the court will order a separate trial to Mr. Collyer, before the other defendants are tried, because it is evident that the object is to have Mr. Collyer tried first.

Mr. Jordan.—So far as we are concerned, we never asked anything of the sort, nor do we wish it.

His Honour.—It makes no difference whatever. The object is to have one tried before the other—and why? The reason is, and there can be no other legitimate reason, that unless there is a separate trial, there cannot be a fair trial; and then the question comes up, that being the reason—has there anything transpired by which it is made to appear that these parties cannot have a fair trial if they are tried jointly? And if there is no reason made to appear that they cannot have such a fair trial, then it is the duty of the court not to order a trial separately. But if it is made to appear that they cannot be fairly tried jointly, then, as I conceive, it is the duty of the court, although it has often been said to be in their discretion, to order a trial separately. What are the reasons which are urged to induce me to believe that the defendants cannot be tried jointly? They are two—the first is, that the defence of some of these defendants is so

¹ This opinion will be reported in next volume of Blatchford's Circuit Court Reports.

antagonistic to each other, that they cannot have a fair trial; and, secondly, that they cannot be tried fairly without having the testimony of their co-defendants in their behalf, as I understand it, and that therefore they should be ordered to be tried separately, so that they could have the testimony of their co-defendants adduced in their behalf. One word as to this latter reason before I consider the first. Is there any ground for that reason, that I should order a separate trial to be had in this case? Whether Mr. Collyer were tried first, or the captain, or the engineer, it is said that the one who is thus tried first, ought to have the benefit of the testimony of the other, and could not have it, and it follows that it should be granted for that reason; and the question is, could he do it? This question has been often before the courts, not only in the states, but before the courts of the United States. It has been before the Supreme Court, in a case reported in Johnson, in a case in Massachusetts, of Pickering, where a separate trial was ordered, and where the party who was first tried offered the testimony of his co-defendants, and it was refused, because the co-defendant was not a witness. Two years ago the same subject was had up before the Supreme Court of the United States. It was a case that went up from Virginia, where two individuals were indicted for murder upon the high seas, and where a separate trial was ordered, and where the one first tried offered the testimony of the other one who was indicted, and not upon trial, and the question went up to the Supreme Court, whether he was a competent witness for the one first tried, and the Supreme Court decided that he was not, although in the State of Virginia a law had been passed prior to the time that the trial was had in the Circuit Court, that where a separate trial was had, the one first tried might have the benefit of the testimony of the other. The Supreme Court decided, although it was so in the State of Virginia, yet in the courts of the United States, the one first tried could not have the benefit of the testimony of the other who was indicted with him, and therefore this reason which has been urged, is not well sustained; for if this defendant was tried separately, the object would not be obtained, for he could no more have the testimony of those indicted with him upon that trial, than he could have upon a joint trial.

Now, as to the other reason. Is the defence so antagonistic that the defendants cannot be fairly tried? I certainly do not think so; if I did, I should be inclined to grant a separate trial. It is not that any one who is acting as captain, or mate, or engineer, and him only, shall be liable under the statute, but it is any person; and in reference to the ground urged by the last counsel, that it is necessary for him to implicate the witnesses in order to excuse the captain whom he represents, I do not understand it so at all; if what he says is true, that the captain was sick, so that he was not able to attend to his duties on board the vessel, and did not so attend to them, and the command devolved upon the next officer—if he was sick and could not attend to his duties, he has done nothing. If that is made to appear, then, as I view the case, unless there is something more in it, and this misconduct happened during his sickness, and he could not attend to it, then in my judgment he will be free, because he will not be implicated in that misconduct. His sickness would excuse him. I do not therefore see any reason upon each of the grounds to which I have alluded, that the defence of the defendants is so antagonistic that they cannot have a fair trial if tried together.

Mr. Dunning, the Associate District Attorney, opened the case for the prosecution. He said:—The defendants have been indicted under the provisions of the twelfth section of the act of Congress, approved July 7, 1838, entitled, "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." That section says, "And be it further enacted, that every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court in the United States, shall be sentenced to confinement at hard labour for a period of not more than ten years." The indictment in this case contains various counts, and in substance charges that the defendants, on the 28th day of July, 1852, were the persons having charge of, and employed on board the steamboat Henry Clay, a vessel propelled by steam; that John F. Tallman was the captain, John Germain engineer, Edward Hubbard pilot, James L. Jessup clerk, James Elmendorf second pilot, and Thomas Collyer acting as captain: that by the misconduct, negligence and inattention to their respective duties, the lives of Stephen Allen, A. J. Downing, Abraham Crist, and divers other persons, were destroyed. It will appear that on the morning of the 28th July, 1852, the Henry Clay left Albany, freighted with human beings, having more than four hundred passengers on board, bound for this city; while on her passage down the river, at about three o'clock in the afternoon, when nearly opposite Yonker's, she was discovered to be on fire, and so rapidly did the flames spread, that they soon gained the mastery, and it was found to be impossible to extinguish them; the boat at this time was near the middle of the river, but was soon headed for the shore, which she succeeded in reaching, her bow being run aground, her stern remaining in deep

water. Then ensued a scene of horror that baffles all description. At the time the vessel reached the shore, most of the passengers were on the after part of the boat, having been directed to go there by those in command. The wind was blowing from the shore, and the fire, which originated near the middle of the boat, was raging to such an extent as to render it almost impossible to pass it. In their attempts to reach the shore, more than eighty of the passengers on board, with scarce a moment's warning, were hurried into eternity. The fearful alternative of perishing by the flames or the waves, was presented to many of the unfortunate passengers of that ill-fated vessel; and each element, the fire and the water, received its share of victims! No age, sex or condition in life escaped—the mother and her infant, the old and the young, the man of four score years and the youth, shared a common fate. For a time the sad tidings of this catastrophe spread a gloom over the land, and well they might—for they brought sorrow and anguish to many a heart, and desolation to many a home. It is charged that this sacrifice of human life, was caused by the negligence, carelessness and inattention of the defendants, and it will be for you to say whether this charge is well-founded. Your position, therefore, gentlemen of the jury, is an important and a responsible one—important for the defendants—important for the community. You stand between the living and the dead; for although your verdict cannot re-animate the dead, it may save the living; may prevent the occurrence of similar calamities; may teach a lesson to those who have the charge and management of steamboats, much needed to be taught, that the safety and lives of passengers committed to their charge are not to be trifled with or taken with impunity. The frequency of occurrences of this character may well excite alarm:—scarcely a day passes, but we receive intelligence through the public prints that life has been destroyed by the recklessness—the criminal recklessness of those having charge of our railroad locomotives and steamboats. And where shall we look for a corrective, if not to a jury, when a proper case is presented for their consideration? Let the law be rigidly enforced, and such occurrences will cease. Let courts and jurors, ministers of justice, falter in the proper discharge of their respective duties, and such occurrences will be more frequent still. I have said thus much, gentlemen, to show you the importance of the position you occupy. I ask you to weigh the evidence for the prosecution calmly and dispassionately, and render such a verdict as will satisfy your minds under the circumstances. I shall not attempt any minute statement of the evidence that will be introduced. I prefer that you should listen to the statements of the witnesses, and take the evidence as it shall fall from their lips, rather than any statements or conclusions of my own. We shall produce as witnesses, many passengers who were on board and saw the whole occurrence. We insist, and I think it will appear from the evidence, that on the 28th July, 1852, the day on which this awful calamity occurred, the *Henry Clay* was engaged in a fearful race—a trial of speed with the *Armenia*—and that from that cause the catastrophe resulted. The vessels left Albany at nearly the same time, the *Henry Clay* being a few minutes in advance of the *Armenia*. That there was a race, we shall call a variety of testimony to prove; the witnesses will detail the occurrences that took place on that passage; and that the race for supremacy was contemplated before the vessels left Albany, will also be apparent. So evident was it to the passengers on board that the boats were racing, and so much were their fears excited, that they remonstrated with the officers, and Mr. Collyer, the captain, being sick, and not on deck, they besought them to desist, but in vain, their remonstrances were unheeded, and the race continued. Many of the passengers who had paid their passage to this city, landed at Poughkeepsie and other points of stopping, being fearful to proceed further in the boat, and pursued their journey by other conveyances. This apprehension of the passengers, this desertion of the boat would scarcely have occurred unless they were satisfied that there was a race. We shall show also that the boat that day, did not make all her usual landings; they were so anxious to succeed in the race, that they passed the landings to which some of the passengers had paid. The vessels were in such close proximity, that at one time the *Henry Clay* ran into the *Armenia*. One of the firemen who went up to Albany on the *Henry Clay*, on the 27th, refused to return on the 28th, fearful of the occurrence of some such calamity as actually happened. That the boats were engaged in a fearful contest for supremacy will, I think, abundantly appear from the evidence; and that each and all of the defendants contributed their efforts to enable the *Henry Clay* to succeed, will also be fully established. Mr. Dunning then proceeded to state the other facts that he would adduce in evidence for the prosecution; that the race was continued notwithstanding the remonstrances of the passengers; that the vessel was certified to carry thirty pounds of steam to the square inch, and that she had much more; that the vessel was not provided with the necessary means of escape—with life boats, life preservers or the usual number of buckets, in case of fire; that each of these was deficient in number, and that the catastrophe resulted from a want of care in this respect; that the vessel was on fire the day before this catastrophe; that she was on fire at an earlier period on the same day, and

that she had been frequently on fire before the 28th July; and these facts, though not bearing on this case, go far to show a criminal negligence; they were notified not only at an earlier hour on the same day, but they had been frequently notified previously.—The passengers would tell the jury of these facts, and that some of them counted the number of revolutions the vessel made, though they may not be able to tell the exact speed she was going at; that, however, is not material; it will be for the jury to determine whether the defendants caused this destruction of lives. They would perceive that by the statute, while the punishment may be ten years' imprisonment, it is within the discretion of the court to reduce it to one day. It was not necessary for the prosecution to show that the defendants, or any one of them, intended this calamity; it was enough for them to show that it was the result of misconduct, carelessness or negligence. The learned gentleman then referred to the able and elaborate charge of his honour, Judge Betts, in the case of captain Farnham, of the Reindeer, in which he says:—The indictment charges on the master of the Reindeer the crime of manslaughter; because, by his misconduct, negligence, or inattention at the time and place alleged, the lives of many persons were destroyed. The question at issue, on this indictment, is whether the government have, by legal and sufficient proof, convicted the defendant of the crime of manslaughter. In the first place the law does not require the public prosecutor to prove wilful mismanagement or mal-conduct by the accused. You are not to inquire if he was guilty of intentional negligence or inattention; but only if he did what is forbidden by the law. The point of inquiry before you is, whether he was guilty of misconduct, negligence, or inattention, and whether the explosion and destruction of life arose from either of those causes. In order to determine that, we must have a clear and accurate understanding of the meaning of the terms used by Congress in this law. By misconduct, negligence, or inattention in the management of steamboats, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal, and it is no matter what may be the degree of misconduct, whether it is slight or gross, if the proofs satisfy you that an explosion of the boiler was the necessary or most probable result of it.—Mr. Dunning concluded his address, which was listened to with marked attention by a crowded court, by saying that it was neither the duty nor the inclination of the prosecution to urge the conviction of the defendants, unless the evidence we shall be able to introduce shall satisfy your minds of their guilt. We are not here to urge the conviction of the innocent; the law neither needs nor seeks such victims. It will be our purpose to introduce such evidence as is under our control, and which, in our judgment, clearly tends to establish the guilt of the defendants. We shall strive to state the case fairly, between the government and the accused, and having done so, we shall have discharged our duty; and it will then be for you, gentlemen, to discharge yours.

Much evidence was given in on the part of the United States, (the trial occupying fourteen days) to support the propositions of fact in their opening.—The facts appeared in proof pretty much according to the previous statement, excepting that witnesses of the prosecution were principally unacquainted with steamboats and their management, and two or three whom they called who were experts in navigation, approved of the conduct of the pilot of the vessel in putting her ashore. The defence was opened by Mr. McMahon, who said:

Before opening the case, I beg leave to submit to your honour one or two authorities, and one or two propositions of law, in answer to the cases which have been cited very frequently by the prosecution: the first proposition is, "That under the act of Congress of the 7th July, 1838, it must appear that the deaths or the homicides must result directly and proximately from the misconduct, the negligence, or inattention complained of." In support of that proposition, I refer to the 12th section of the act, that every captain, engineer, pilot, or other person employed on board of any steamboat, or vessel, propelled in whole, or in any part by steam, by whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person, or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof, before any circuit court of the United States, shall be sentenced to confinement at hard labour for a period not more than ten years. The act declares that the death must be caused directly and proximately by misconduct and inattention to their respective duties. The second proposition is, that mere negligence or misconduct, or mere inattention, although it be sufficient to charge the officers in a civil suit for damages, does not subject the defendants to this indictment, and that an error in judgment, such as putting this boat on shore, or in the confusion that ensued on that day, when the fire was discovered, in ordering the passengers aft, does not constitute the misconduct, &c. as used in the 12th section. It must be such negligence, or such misconduct, or such inattention as would, when committed, be likely in itself, directly to cause the homicide; thus in a case of bursting boilers; for the engineers to put extra weight on the safety valves, or for the captain to engage in a race with a rival boat, and in such race his boilers would collapse from the extra strain put upon them; and the act of omission must be such, as that its performance, or non-per-

formance would be a notice to the officers doing, or omitting to do the act, that he was guilty of criminal dereliction of duty. Rex agt. Allen and another, 7 Carrington & Payne, page 153; Rex agt. Green, same vol. page 156.—The third proposition is nearly involved in the second; that the negligence, misconduct, or inattention must not be merely omissive, but it must be such gross negligence as is akin to fraud, under the law of bailments, or as Judge Betts expresses it, “intentional negligence.” (3 East’s Pleas of the Crown, 265.) My fourth proposition is, that under this indictment it is necessary to show that each of the defendants, in the performance or non-performance of his respective duty, was guilty of such misconduct, neglect or inattention, as that thereby, they all directly caused the injury complained of, and that their acts converged to, and had in view some great personal injury to the passengers.—Now with regard to the inferior officers of that vessel, for instance the captain’s clerk, it is necessary we suppose under this indictment, that the prosecution must show that he was guilty of such misconduct in the performance of his duties, in selling and taking tickets, so that that directly converged to this fire; because under this 12th section, the homicide must be occasioned by the misconduct, negligence, or inattention to his or their respective duties; so with the assistant pilot, and so with the other officers of the vessel. The next proposition is, that even if there be, as claimed by the prosecution, a general concert of action towards this race, yet, under this act, the officers of this vessel, not in command, and not in charge of the fire, cannot be held responsible for the fire. I am assuming the claim of the prosecution—admitting nothing; for although as claimed by the prosecution, they might be guilty of misconduct in assenting to the race, yet their misconduct had reference to the race, and not to the fire; and, in the absence of any evidence, as in this case, on the part of the prosecution, to show that this fire was a direct consequence of that race, they must be acquitted. One word as to the opinion of Judge Betts, in the case of the Reindeer. I happen to know something about that case, although I was not one of the counsel who tried it. The boilers of that vessel exploded on the North river, at Malden landing, and it was shown, affirmatively, on the part of the prosecution, that there was a violation of the act of Congress on the part of the officers of that vessel, in not causing the safety-valve to be raised at each landing place; and the prosecution claimed, and direct affirmative testimony was given to show that that collapsing of the boilers arose from the pressure of steam, which pressure was occasioned, in a great measure, by the negligent act of the officers of that vessel, in not doing that which they are enjoined to do by the act of Congress. I state these facts with reference to this opinion, in order that the court may see that it is entirely a distinctive case from the present. There was evidence to show that the collapsing of these boilers, arose from the want of a performance by the officers of that vessel, of the duties enjoined upon them by the act of Congress. This was a charge to the jury: it was not brought up in any authoritative way, so that counsel upon both sides, could discuss this particular question of law. The case was entirely distinctive from the present case, and I do not think that any more weight should be attributed to it, than to those English cases which I have cited, and which were determined upon in solemn consideration by a bench of judges. May it please the court, gentlemen of the jury, the duty has now devolved upon me, to open this case on the part of all the defendants charged in this indictment; I represent in fact only four of these defendants, but my colleagues not wishing to trifle with your patience, in having three openings of this case on the part of the defence, the duty devolves upon me of representing all the defendants. It is with the most profound emotion that I rise to address you upon this occasion. We have here upon trial six men of the utmost respectability, who are charged here, after all, for nothing more than negligence, by the prosecution, and they are charged with an offence of the gravest magnitude, the effect of which will be to consign them to what would be worse than death to them—a living tomb. I feel, gentlemen, the responsibility of the task which I assumed here, in opening this defence. I look upon the one side and observe two prosecutors, who, by their acts in this case have shown their determination to convict these men of the offence with which they are charged before you—an offence of the gravest magnitude; but yet when I look to my clients, I feel reassured by the innocence of their looks, and thus imbued with this profound conviction of their innocence, I rise to address you upon this occasion.

Now what is the offence with which they are charged here before you? So far as regards the act of Congress, under which they are charged, or so far as regards the particular indictment, under which they are brought to trial before you, there is no fact, no circumstance, which would give any notice to these gentlemen of what they are to meet in this case, nor had they any notice, in point of law, of what they were to rebut, until the evidence was given on the part of the prosecution. I say, therefore, that they are bound to consideration in that respect. Men charged with the consequences of negligence, how difficult it is to show exactly, step by step, every act which they did upon that day. Yet this act of Congress is very comprehensive. It is very general in its provisions; the indictment is equally general; it does not allege any duty which they are

called upon to perform, nor any breach of that duty, except in most general terms; and so far as regards the act of Congress and the indictments, the defendants knew nothing until they were brought into Court, of what they were to meet. Now, gentlemen, on the 28th of July, 1852, a most appalling catastrophe occurred upon the North River, by which a number of human beings were sent into eternity. So awful and dreadful was this catastrophe, that immediately the public papers took it up, and the public jumped to the conclusion that these men were necessarily guilty of misconduct or negligence. It was spread through the land, and when this case was referred to, it was called "The Henry Clay murder;" and whenever it was brought up in any court of justice, the "Henry Clay murder" was a constant expression; but, gentlemen, very fortunately, fifteen months have elapsed since that occurrence, public excitement has to a great degree, died away, and very fortunately for these defendants, they now stand before twelve men who are unprejudiced, and who come to this cause with no bias on their minds. Gentlemen, it is a fortunate circumstance, and one which these defendants rejoice in, that they are enabled for the first time, to spread forth their defence before the public, and to justify themselves in the eyes of the world. What must have been the feelings of these men during the last fifteen months? How dreadful, how agonizing must have been their thoughts, when at every turn they were charged with the most heinous of offences? But truth will prevail at last; and I appear before you now to develop what we conceive to be the truth in this case, and to justify every one of these men in what they did; we deeply deplore the calamity that ensued, but we will show you by evidence and by facts that will not lie, that they are innocent of any guilt in the premises. The prosecution here claims that on the 28th of July, the Henry Clay started from Albany a little in advance of the Armenia, and that shortly after, a race occurred between those two boats. They claim further, that that race was the cause of a fire which ensued some eighty-five miles below, where these vessels were shown to be in close proximity to each other. No evidence has been introduced here by scientific men, by engineers, or by any one who, by reason of their location, ought to know; no evidence has been introduced, to show that the fire was legitimately the result of that alleged racing. Let us suppose there was racing on that day; does it follow that the vessel was set on fire by that racing? If the boiler had burst upon that, it would be perfectly legitimate to infer that the boiler burst from the race. But it does not, by any means follow, that because there was a race eighty-five miles above the scene of the catastrophe, of necessity, that fire originated from that race. Now, gentlemen, in order to rebut any possible conclusion or inference upon your minds, by the evidence which the prosecution has here introduced, we will put upon the stand, engineers of the greatest respectability, who will show, by their scientific testimony, that this fire could not have occurred from any racing; that this vessel might have been driven to its extremity of speed upon that day, yet the boilers of the vessel were so arranged, water bottomed, the fire surrounded on every part by water, that it was impossible, in the nature of things, for the fire to originate from that racing. We will not put upon the stand a man brought from Yonker's, who knew nothing about steamboats, nor had been engaged in any capacity on board a steamboat, but we will put upon the stand scientific men, who know what they are talking about, and to whose evidence you are bound, gentlemen, to give the utmost reliance. Was there any racing on that day? I shall not go over the evidence of the prosecution, for it is out of place in the opening of a case, for a counsel to recapitulate in minute terms, the evidence introduced upon the other side, I will merely generally allude to it. You have all heard the evidence of these excited passengers, (Mr. Minturn and so forth) from the commencement to the end, a great many of whom differ in the details of this occurrence; one of them makes this collision one and a half miles from the western side of the river; another makes it almost on the western side of the river; and a third places it just reaching Kingston dock. A number make it four or five miles above that place, and one goes so far as to say eight or ten miles above Kingston dock. We will put upon the stand pilots of long experience on this river, who will develop to you the channel of that river, and who will show you how devious and winding that channel is from Hudson down, and that it runs from one side of the river, and goes again to the other until it reaches Kingston, and what struck these excited passengers as being racing, from the fact that the Henry Clay came out to meet the Armenia, was nothing more than the Henry Clay pursuing the natural channel in her navigation. We will put upon the stand pilots who will explain to you about the collision of these two vessels; that it arose from the principle of suction, and that when two vessels of a class, or nearly of a class, as the Armenia and Henry Clay, are in close proximity, the principle of suction is such as would bring them together, and that what the officers of the Henry Clay did upon that day, was perfectly proper, under the circumstances of the case. They had excited passengers on board, crying out, "What must we do?" The Armenia was in their way. We will put upon the stand, passengers who will show that the Armenia came out and met the Clay, and that the Clay endeavoured to avoid the Armenia, and for that purpose, on

one occasion, run inside of a sloop, not a great distance from the eastern shore, in order to avoid her (the Armenia.) We will put upon the stand, witnesses to show that on that day, the Henry Clay was not making her ordinary speed; who will prove that she could make twenty-seven and twenty-eight revolutions of her wheel in a minute, and that her speed was from twenty-one to twenty-two miles an hour; and, further, that at different landing places upon the river, she was behind her time. When you connect that fact, gentlemen, with the fact that at the time she was run ashore, she was an hour or an hour and a quarter behind her time, can you arrive at the result that there was racing on that day? It is absurd to talk about it; there was no racing on that day; and for fear that there should be racing, an agreement was entered into between the owners of the two vessels, before she went on her trip to Albany, that there should be no racing, and that the Armenia should keep behind the Clay on the up trip and down trip. Yet, gentlemen, for fifteen months has it been bruited throughout the land, that these vessels were engaged in a deadly strife; that pitch and tar were used, and that the utmost means were resorted to by the officers of that vessel to beat the Armenia. Why, gentlemen, it was, as stated by one of my colleagues, a "cripple's race." One witness testifies that he got on board the boat at Hudson, which is thirty miles from Albany; that he started a little before seven; and that she was going fourteen miles an hour. One witness gets on at Poughkeepsie at 12 o'clock, which is seventy-two miles from Albany, and she was then going about fourteen and a half miles an hour, and at the time she was run ashore, it was from three and a quarter to three and a half o'clock, P. M., being eight hours from Albany, a distance of one hundred and thirty-five miles, which would make her rate of speed from fifteen to sixteen miles an hour. If they had been going twenty-one or twenty-two miles an hour, for eight hours, they might have reached Sandy Hook.

Thirty years ago, for a steamboat to go eight or ten miles an hour, was considered extraordinary speed; but such has been the force of American energy and go-ahead-iveness, that from that time to the present, improvements upon improvements have been made in the speed of vessels; and it is well known that there are now in our harbours, vessels that go from sixteen to twenty-three miles an hour. But the prosecution says, that in order to race they made extraordinary fires; that these extraordinary fires were made seven times hotter, in order to keep up the steam; and the safety-valve was bound down, in order to run this vessel at the extraordinary speed of sixteen miles an hour. For that purpose, they have introduced some passengers who stood, on a hot day, on the promenade deck, in the vicinity of the engine room and her steam drum, and they found it hotter than they ever found it before; what they mean by that, gentlemen, does not appear before you, as these witnesses are not shown to have had any experience on steamboats. It is absurd and ridiculous for the prosecution to send six men to the State Prison upon evidence like that; we have to meet that evidence, however ridiculous and absurd the testimony is; but we shall be able to place upon the stand, witnesses who will put a quietus upon it. We shall show, in reference to the construction of the Henry Clay, that this steam drum or chest on the promenade deck, was uncovered, and the reason of its being uncovered was for greater security against fire; it was found by one of the owners of this vessel, that another steamship belonging to him had taken fire from the steam-drum being covered, and consequently, on this boat a different regulation was made use of. It would very naturally happen, that persons standing on the promenade deck, with the steam-drum uncovered on a hot day, and but little breeze above the Highlands, would feel very warm. Now as to the subject of extraordinary fires; when steamboats intend to race, they take on board an extra quantity of coal, they employ extra firemen, they break them up into many watches, and do a great many things in order to carry out the race; but we will show to you that on that day no more coal was taken on board than usual, and that there was no tar, pitch, or rosin on board; Lackawanna coal was used, and that of the best quality; and no extra hands were employed besides the regular men; we shall show that there was but a little breeze above the Highlands, and further, that from the commencement of the voyage until Catskill, the pressure of steam, as indicated by the gauge, was much less than she was allowed to carry by law. One word upon that subject; they have introduced upon this stand, an aged man, who, from his testimony, has shown his liability to make mistakes, for the purpose of proving that the certificate of that vessel only allowed her to carry thirty pounds of steam, but we shall show to you, by a number of witnesses, although that certificate has been consumed by the flames, that that certificate allowed her to carry thirty-five pounds of steam; and further, that it was perfectly safe for the boilers of that vessel to bear fifty pounds of steam, and that they were built with the intention of carrying seventy-five pounds; but for greater security, and at the request of the engineer himself, the certificate was narrowed down in one year from sixty pounds to thirty-five pounds; and the reason was, not as Curtis stated, because he saw some defect in the furnace, but, because, although the boilers could bear sixty pounds with safety, yet it

might not be with safety to the other parts of the machinery of that vessel, for in the spring of 1852, an alteration was made in her steam cylinder, and a larger one was put on board. We shall show that the fire-room of that vessel was better constructed than that of any other vessel of her class on the North river, and that with her boilers below deck, she had greater precautions against fire than any other vessel of her class; we shall show that she had, which few vessels were furnished with at that time, a steam cock, for letting off the steam, in order to extinguish the flames; we shall show that these boilers were properly covered with the usual covering; that they were far back, where no fire could reach; that the fire broke out on the starboard side of the starboard boiler, immediately under the grating, on the side of the vessel where no fire could reach; we cannot account for this fire; we did not set the vessel on fire; because, gentlemen, it would have been too great a loss to the owners of this vessel; they will lose by this catastrophe \$200,000; it is a deep and abiding calamity to them. This fire occurred either from accident or design; if it occurred from accident, it was no accident that happened through the acts of any one of the firemen or the officers of that vessel. We can imagine how it occurred, but we are not called upon to show how. We could refer to the testimony of Mr. Wilkes, who was so prophetic upon that day, but who has never been so prophetic since. We could show that a lying, drunken fireman was discharged from his employ, and a great many other facts, but it is enough for us to show, that on that day, it occurred through no negligence, misconduct, or omission upon our part. The prosecution claims that if the pilot had put that vessel ashore in an angular, sidelong position, the passengers could all have escaped. For fifteen months has this been bruited about in the public prints of the United States. Men, knowing nothing of steamboats, have discussed eloquently upon this subject; that is one of the most cruel things that has ever occurred in this case, and I say that the pilot, instead of being indicted, should have received from those passengers who now malign him, a testimony for his good conduct in putting the vessel on shore. That pilot is one of the best men of his class in the State of New York. He has a rough exterior, but a kindly heart; for although his pilot-house was in flames, and the boards crackling at his feet, and although he ran the risk of being crushed by the steam pipe and walking beam, yet, like a Roman sentinel, he stood at his post, and did not abandon it. We shall produce evidence to show that, had the vessel been run ashore in an angular or sidelong position, she would have shot off into the stream, and every soul on board would have perished. We shall show, by the most competent witnesses, that the vessel was put on shore in the most proper and scientific manner. We shall put upon the stand, if we deem it necessary, the pilot of the Hendrick Hudson, who was run into by a sloop, and in attempting to run his vessel sideways on shore, came very near losing her and all the passengers he had on board.

It has been claimed by the prosecution, that if the officers on board the vessel that day had performed their duty, and had they given directions to the passengers what to do, the lives of all would have been saved; and it has been harped upon, in the course of the trial, that there was an order given to the passengers to go aft. Now, supposing that it was so, it was a perfectly proper order, as will appear by our evidence. This vessel was going to the shore head on, as was right and proper. If it had been a rocky bottom at the place where it struck, the effect would have been that the vessel would have been broken in two; if this had happened, her boilers would have collapsed, and all those who were forward would have lost their lives. Another circumstance was, the bow of that vessel could not, by any possibility, hold a quarter of the passengers upon it, suppose then, that the order had been given to rush forward—in a body of four hundred excited passengers, having the fear of death before their eyes, how many of them would have found a place of security there? Why, as it was, when the vessel reached the shore there was not standing room even for those who were already there. You would, therefore, have enacted there the same scene that takes place where a theatre is burned and the doors are shut, and no one can get out. The same fears, the same struggle to get out and get forward, would have ensued; and yet the prosecution, in their ignorance of what they were talking about, got up and introduced testimony in order to poison your minds. But we shall show that so intense was the excitement, that even before the vessel had reached the shore, between thirty and forty (and some say as many as fifty) persons leaped off into the river. In such a state of things, there was absolutely no use in trying to restrain them. Many of us, indeed, did try to do so, the officers tried it, but it was found impossible to succeed. The passengers were panic-stricken, and like every panic-stricken crowd, rushed they knew not whither. It was, as described by one of the witnesses for the prosecution, a beehive. Now, gentlemen, what could the officers have done on that occasion? Mr. Hubbard, the pilot, was in the pilot-house; he did not abandon his position. We shall show you that Mr. Collyer, Mr. Elmendorf, the engineer, and the barman, were all engaged in pouring water down the fire-room in order to check the fire. We will show that one of the officers was on the lower deck, and or-

dered all to go forward; that persons were sent to the crowd to tell them that when the boat reached the shore, they should go forward; and that when the vessel did reach the shore, every officer in the vessel, as soon as they saw persons struggling in the water for their lives, sprang forward to save them. Now, for the last fifteen months, the brunt of this offence has been charged on Mr. Collyer; every one has united in condemning that gentleman, and yet no one exerted himself more than that same Mr. Collyer. As soon as the vessel reached the shore, he did not spend his time in hunting after his carpet-bag, or standing on the shore crying "Oh dear!" but he sprang to a fence, broke it down, rushed with it into the water, placing boards within the reach of all that it was possible to approach, and was the means of saving fifteen persons. He rescued so far as man could by his own unaided exertions. What did the engineer do? he was in the water likewise; but, for a part of the time, he was endeavouring to scuttle the vessel, thinking that by sinking her the fire could be put out, or the flames quenched, or that the vessel might be made to touch the bottom, and the lives of the passengers be thus to some extent rescued. Captain Tallman had on that day been confined to his berth from an attack of the cholera-morbus, and unable to be on deck, except at intervals for the purpose of breathing fresh air. Though he was taking calomel, a kind of medicine which rendered it exceedingly dangerous for him to go into the water, yet he sprang in, got hold of a boat, made two voyages in it, and was the means of taking to land some nine or ten ladies. No efforts made to save the passengers! Why, their efforts were superhuman; they did all that men possibly could; and when Captain Tallman reached the shore, he had to be carried on board the *Armenia* almost insensible, and was obliged to be immediately put to bed. What as to the pilot? He was in the water, and I could relate to you several touching incidents of his acts, when his kindly nature was aroused. Mr. Jessup was up to his neck in the water, doing all he could, though he was unable to swim. Mr. Elmendorf, too, was making exertions. There was not an officer on board that boat, whether engineer, assistant engineer, pilot or assistant pilot, captain or Mr. Collyer, that did not make more than human exertions in order to save the lives of those passengers. Why did not the prosecution ask Mr. Minturn whether any thing was done to save the lives of the passengers? They did not; and if they had, it would have let us understand what they were endeavouring to set up, and we could have elicited that on that day Mr. Collyer made most superhuman exertions. But it is said that the vessel was not sea-worthy. On this subject I will make a few remarks; we will introduce evidence to show that the vessel was built by one of the most talented ship builders in the United States, Mr. Collyer; that she was built with a view to rapidity of motion in the water, and also with a view to safety. We will introduce evidence to show that the witness, Edwards, who said he saw wood around the smoke chimney charred, must have lied, because there was no wood-work touching it. On the contrary, there was such an opening that there was at least a foot of space between the chimney and the wood, and besides that, there was a protection of canvass on each side. I will show, too, that the vessel was built in every respect with an eye to security, and especially to safety from fire. We will show that she had twenty-four buckets for water, on her hurricane deck, and two boats, capable of containing fifty passengers, and four chain-buckets on her forward deck; that she had a steam cock to let off the steam, for the purpose of extinguishing any flame, steam being the best extinguisher known; that we had one of the most experienced masters on the river, who, however, on that day was unfortunately sick and confined to his berth; that we had one of the best pilots on the river; one also of the best engineers—the man whom Cornelius Vanderbilt would not go to sea without, and one of the most scientific and careful pilots in the craft; that we also had a good second pilot, and a good clerk, who was selling tickets, and is now claimed by the prosecution to have set the vessel on fire. We shall prove that it was a steamboat of the most improved model, and we will show on the part of the officers of the vessel, the best possible character for care, skill and caution. Now in conclusion let me beg of you not to listen to the voice of prejudice. For fifteen months have these men been pursued with public odium; their characters maligned in every possible way—standing under this indictment—in another county actually charged with murder; fortunately, however, able to quash that; then charged with manslaughter. Actually under that indictment in another county, pressed vigorously too, by the prosecution for fifteen months. Nor were the public, notwithstanding, satisfied with that—during the whole period the officers of the steamboat and the owners were pursued with public odium. The matter was spoken of as the steamboat so and so, commanded by Captain Tallman, and piloted by Edward Hubbard. During the entire period, they suffered intensely and agonizingly from the attacks upon their character, many having wives and children, most of them having those who were near and dear to them depending on them for their subsistence, and suffering the most intense anxiety for the result of this prosecution. I beg of you, gentlemen, in conclusion, that you will not listen to the voice of prejudice, but that you will calmly and dispassionately

consider the testimony submitted to you. When we get through we will scotch the snake; we will put an end to the malignity of the prosecution.

Evidence at great length was introduced by the defence, to prove the facts contained in their opening.—The case was summed up by Mr. Jordan for Collyer, and by Mr. Wheaton for Germaine. Mr. McMahon, after their summing up, declined to speak.—Mr. Wheaton then commenced summing up for the defence; as it had been remarked by the counsel who opened the case, it was one undoubtedly of very great importance in its results, both to the public, who feel a deep interest in it, as well as the defendants themselves. Most certainly it was so to the latter, for on this occasion the jury had before them, men who had not heretofore been charged with crime—men who had, up to the time of the destruction of this boat—he might say up to the present time, held as high a position in society, and had had the confidence of the public, perhaps as much as any of their fellow citizens that could be selected from this city. They were men accomplished in the employments in which they were individually engaged, and their employments were such, as the public had the deepest interest in having responsible or skilful men employed to perform. They were arraigned upon a high charge, with being the criminal authors of the most extraordinary destruction of human life that has occurred for some time. If the crime which has been alleged against them shall have been proved, it will expose them to one of the highest punishments known to our laws—they being liable to be consigned to the state prison for a period even of ten years; their characters, of course, too, to be destroyed in the estimation of the public, and themselves to be cut off from society, and even be deprived of their liberty. The jury saw, therefore, that the case was of the utmost importance, but still they came into court, and presented their defence with the utmost assurance, and the utmost confidence, that after a fair examination of the evidence that had been produced on the part of the defendants, the jury would be satisfied, not only that they were not guilty of the crime which had been charged against them, but that there was not the semblance even of a crime made out against them.—There was no doubt this was a case in which the public had felt a deep interest, arising, as it did, out of an almost unparalleled destruction of human life, and a feeling had got abroad that the whole case should be thoroughly investigated, and beyond a question, it was peculiarly proper that a thorough search should be made to ascertain, if possible, whether any one was the criminal cause of the destruction of human life in question. But they must act against individuals, only upon evidence, and he did say that if there had been no more evidence before the grand jury, on which to ground their presentment against the accused, he was amazed how it was possible that they could have come to the conclusion of there being *prima facie* evidence against the defendants. But they all knew how investigation before coroners' juries was conducted—that only one side of the case was presented for consideration, and that the defendants had no opportunity of cross-examining the witnesses, or of discussing the testimony, as to whether it was sufficient to ground an indictment upon it, or even presented a case that was proper for investigation.—He would next call the attention of the jury to the statute upon which the indictment was framed; see what it was the defendants were charged with, what testimony would be required for conviction, and then look at the evidence in the present case, to see whether really there was a single fact on which the prosecution could rely, for the purpose of obtaining a verdict. This indictment was founded on the 12th section of the act of Congress, entitled an act to provide for the better security of the lives of passengers on board vessels propelled in whole, or in part by steam; and he called their attention particularly, to the wording of the section. And every person employed on such steamboat, impelled wholly or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, shall be sentenced to confinement with hard labour, for a period of not more than ten years. The first thing to be found upon this was, whether the persons charged with the offence were employed on board such a boat, and had some distinct and particular business on it to perform. Then what misconduct, negligence, or inattention to their respective duties they had been guilty of: then you must find a particular act in each instance, against each of the defendants charged. In the case of an indictment arising out of a boiler explosion, Judge Betts laid down that by the misconduct, negligence, or inattention in question, was undoubtedly meant the omission, or commission of any act, the necessary or most probable result of which was the loss of human life; and no matter what amount of misconduct the parties were guilty of, it must be shown clearly and distinctly that the misconduct led to the destruction of human life in question. Let them now apply that to the present case. The jury had heard about the inspector's certificate, but the inspector had not power to compel obedience; he could only give a recommendation as to the quantity of steam, and the parties might follow it or not, just as they chose. Great stress had been laid by the counsel for the prosecution upon the fact which they strove to establish, that the limit was thirty pounds; but there had not

been a particle of proof that at any time during the whole distance between Albany and Yonker's, she had carried an ounce of steam beyond thirty pounds, but, moreover, the weight of evidence was most decidedly in favour of the defendants' position, that the amount of steam fixed was thirty-five pounds. There was to this point the testimony of one of the firm of Radford & Co., and several other witnesses, to that effect. Even from one of their witnesses' testimony, it was as likely that it was thirty-five pounds as thirty pounds.—Let them take the different officers, and see what they had been guilty of.—What misconduct, for instance, had been proved against the engineer? Had he not managed, in the most skilful manner, so far as his part was concerned, up to the moment that the boat struck the land? He challenged the counsel for the prosecution, when he stood up, to point out any act of his which was criminal—any omission to perform his special duty. If he could not show this to the jury in letters of living fire; if he could not show it to them so plain, that the way-faring man, though a fool, could see it; if he could not point it out to them so plainly that the human eye could not be deceived, then, appealing to the true spirit of our law, that a man is not to be presumed to be guilty until his criminality is clearly and satisfactorily established, he should ask them with confidence for their verdict on the part of the defendants. Then, what had been proved with respect to the pilot? The prosecution had, indeed, only attempted to urge one fact against him, and that was, that crossing over to his landing place at Kingston, he had run his vessel in contact with the other, and that this was a culpable act on his part, he having at the time the control of the helm. Well, even supposing the jury found that this had been a wrong act, though undoubtedly his vessel had been chased by the *Armenia*, either in the endeavour to make the landing first or to get into the suction of the *Henry Clay*, this act could not be said to have any connexion with the burning of the vessel; it was eighty-five miles from the place where the fire had been first discovered, and the contact had been appropriately described by one of the witnesses as a blow, and then separate. The *Clay* had not been injured at all; not even had her paint been rubbed. All the time of the accident, much excitement had prevailed, and every slander that human ingenuity could suggest, had been thrown out against the accused. Indeed, to such an extent did the excitement go, in relation to the matter, that looking back at it now, and considering it coolly, they could only regard it with astonishment. The catastrophe was undoubtedly an awful one, and the public, in their indignation, did not stop to examine whether this person or that person was guilty, but with one general voice exclaimed against all the officers.—They are guilty, punish them. A victim was demanded, and the voice was, let us pay back life with life, but the laws were not now so vindicated. This had gone out with paganism; the time had been when, if the winds blew unpropitiously, the oracle was consulted, and the answer was that the storm should be appeased by the sacrifice of human life; but that time has passed. Punish the guilty by all means; but let them take care that it was the guilty they punished. The defendants were charged with bearing on the waters, a precious burden of men, women and children; but let them punish the innocent, and what would the navigator say? that it made no difference, let him be as careful as he could—when the public indignation was raised, and a victim called for, it took the innocent as well as the guilty. It was a happy thing in the administration of our laws, whenever there was a great deal of excitement prevailing against an individual charged with a crime, to put it off until the public mind had settled down under the excitement. In the present case, they had waited until the excitement was in some measure subdued, and the consequence was, that instead of having the court crowded with spectators, there was only a small gathering, for the purpose of gratifying their curiosity, rather than from revenge.—He would now read from *Starkey*, 478, a distinction in criminal cases, as contradistinguished from civil ones:—"The distinction between mere proof, and mere preponderance of evidence, is very important in all criminal cases; it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved: neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient, unless it generates full belief of the fact, to the exclusion of every reasonable doubt. It was laid down in the 507th page, that the conclusion to be drawn should be fully established; that if the basis was unsound, the superstructure could not be sound; that the party upon whom the burden of proof rested, was bound to prove every single circumstance which was essential to the conclusion, in the same manner and to the same extent as if the whole issue rested on the proof of such individual and single circumstance. An attempt had been made in this case to prove that there had been racing, and inferences were sought to be drawn from this; but before this could be done, they must first be convinced of the existence of the fact, that there was racing: but not only was there no evidence as to this, but every fact and circumstance went to show that not even was there any attempt at it; that even if the racing had been proved, it was not shown that the fire in question had resulted from it. The evidence of Mr. Belknap went to show that the furnaces were surrounded with water, and that, consequently, it was utterly impossible to raise

the heat to such an extent as to set fire to the wood-work by radiation.—[Counsel then proceeded to review the evidence produced for the defence, and concluded by saying:] With respect to Mr. Ridder, I shall say nothing, in consequence of the fact of their having disparaged his testimony, by showing that he told a very different story at the indignation meeting. From the appearance of the man, and the circumstances that transpired during the examination, I apprehend that he was a little desirous of making a speech there which would satisfy his hearers, and in all human probability he said things then that he was unwilling to corroborate under oath. He was making a speech to an excited meeting, that would not listen to any vindication of the officers, and I apprehend that he told stories then which he was not afterwards willing to corroborate under oath. I will, therefore, pass over his testimony. With respect to that of Mr. Van Buren, which there can be no reason to disbelieve—instead of there having been anything criminal on the part of the pilot of the *Henry Clay*, in what he did, it would appear that he did nothing more than what was right for a vessel under such circumstances to do, in order to obviate what the *Armenia* was endeavouring to accomplish, by dragging herself along in the *Henry Clay*'s suction; in trying to make the landing at Kingston before her. I appeal to you in conclusion, whatever else may happen, whatever may be the strifes or disputes, only keep sacred the altar of justice: let the sword be wielded only by the hands of a pure and honest jury, and then, when it strikes, the public voice will say Amen, and, when it acquits, Amen. It reverberates through the halls of justice, and will reach the utmost corners of our Union; and that it may continue to be venerated, I call upon you on this occasion, if you are not satisfied of the guilt of these men, to say so promptly; there is a great deal in promptness: let not the public think that you have doubted, because of a long continuance in deliberation. The facts are few, though so much time has been spent in this voluminous evidence, when you come to winnow out the wheat from the chaff, how much is there of the wheat left? How much out of the whole mass of evidence is there that bears upon any of the questions, upon which you are to satisfy yourselves, before you pass your verdict upon the case which is now before you?—Has there been a culpable omission on the part of either of these defendants? If there has, can we say clearly and distinctly that that act which we have marked down as culpable was the cause of the destruction of this vessel, and, consequently, the cause of the destruction of human life? Gentlemen, ponder upon these things, if you have doubt. If you have no doubt, let me ask you, in favour of these men, whom you would be proud to honour, and whom the very kindness of your hearts would prompt you to favour—say to them promptly, and in that pure energetic language, consisting of these words: In our opinion you are not guilty of the charge brought against you.

Mr. Jordan, (counsel for Mr. Collyer) then proceeded to address the jury on behalf of his client. If, said he, I had the power, gentlemen of the jury, of taking the vote of the jury whether they would hear any more on the part of the defence, I should feel very well satisfied, in my own mind, that any remarks which I am about to make would be excluded: it appears to me that such is the nature of the case, and such the demonstrations of innocence of all the parties concerned in this indictment, that it would be unnecessary to spend time in any further discussion. I did not expect, until recently, for reasons personal to myself, and therefore not necessary to mention, to take part in this discussion; but feeling a little more like a man to-day than I have for the last three or four days, I shall endeavour to show you, beyond all doubt, that my client, Mr. Collyer, the only person with whose defence I am particularly charged, is entirely beyond the scope and pale of this indictment, and that to punish him, under the act of Congress, is entirely out of the question; and if I undertake to submit my views upon the general subject, which has been ably and eloquently discussed, they will be very general indeed. My object is, more particularly, to perform a dissecting process upon some of the testimony. I intend to show that all the witnesses who have sworn to facts relative to Collyer, have so exhibited themselves before you as to entitle them to no credit or consideration; not that I intend to charge them with untruthfulness, but that they were so excited, that they were unable to discriminate as to the facts which they swore to. It is one of the noblest efforts of the human mind, to endeavour to raise itself above prejudice and error, and to arrive at truth; because truth is always the foundation of justice, and falsehood and fiction always the basis of every error. Courts of justice are instituted for the purpose of arriving at the truth; they were framed for that purpose; facts are frequently coloured by men's feelings and prejudices, but when we come into a court of justice, where the balance is held equal and even, and where the judge sits with that equipoise, which is necessary to the calm investigation of truth, it is there alone that we can arrive at the truth of the subject in controversy. It is that which distinguishes courts of justice from mobs. It is that which distinguishes courts of justice from those indignation meetings that we have heard of; not that I feel disposed to cast any blame upon those persons who assembled at the Astor House for the purpose of passing resolutions upon this subject; because I know, under the impulse of their feelings, it was the only vent their

human nature had to let off, so that under the pressure and agony of their feelings, something might go forth to the community; and though it was rather of a vindictive character, and the circumstances under which they were assembled unfavourable to the investigation of truth, yet it was a relief to them, which I have no disposition to find fault with. I shall proceed, first, to consider whether Mr. Collyer is implicated in the indictment, admitting that all the rest are to blame; and secondly, I shall proceed to make a few general observations, for the purpose of gleaming a few facts. I will demonstrate to you that Collyer is not implicated; and further, notwithstanding the efforts of the able prosecutor, which will be continued up to the death, I will show that all these defendants in this case are equally innocent with Mr. Collyer, who had nothing to do with the matter, and is not implicated in this transaction at all; you will recollect that this is an indictment under the statute of an act of Congress, but it is not an indictment at common law, for no such indictment at common law would lie; it is therefore under the act of Congress alone, that these parties can be indicted and punished, and they must be brought within the terms of that act of Congress, one and all of them, in order to find a verdict against them. That act of Congress being a penal statute, must be strictly construed, and they must be strictly brought within it before they can be punished according to the penalties inflicted by the twelfth section. I will once more refer to the twelfth section of the act of Congress, not generally, but for a particular purpose which I have now in view: "Every captain, engineer, pilot, or other person employed," (it is the word "employed" which I wish to call your attention to) "and who shall, by any misconduct, negligence, or inattention to his or their respective duties, destroy the life of any person on board, shall be guilty of manslaughter." Now, the first question is, was Mr. Collyer employed on board this vessel? I beg to call your attention strictly to the section, and to impress upon you that no man can be convicted unless he comes within the meaning of the word "employ," and I shall ask his honour, which, I think, will be his obvious duty, to charge the jury that to convict Mr. Collyer, or any other person here, it must appear that he was employed on board the vessel at the time of the happening of this accident. Mr. Collyer was one of the owners; but the Act of Congress has nothing to do with owners of a vessel, and it has purposely omitted them. It would be unjust and improper to make the owners of a vessel responsible in a criminal prosecution, for the negligence, misconduct, or inattention of those engaged in the navigation of the vessel. But if the owner goes on board and takes charge of the vessel,—if any third person goes on board and takes charge,—if any man should substitute himself in the place of the captain, and in case of illness, or from some other cause, assume the command of the vessel, he would, I am willing to admit, be within the true interpretation of the act of Congress. The question then is, was Mr. Collyer in that situation? Mr. Collyer was a ship-builder in the city of New York, carrying on such business here, and he constructed this boat as he had many others. He was the owner of five-eighths of her, and I shall show that he had performed his duty as owner by providing one of the best vessels that was ever built in this port, or that ever ran upon the Hudson river, and so far as he was concerned, together with his co-owners, he provided one of the best set of men who were ever employed upon this river: all young, active, intelligent, vigilant men. It has been satisfactorily proved that this vessel was fully equipped with boats and buckets, and that the hull of the boat was one of the most substantial kind; and one of the witnesses, a pilot, tells you that her running up on to the beach in the manner she did, and remaining unbroken, was an evidence of the substantial qualities of the frame of that vessel. The learned counsel then proceeded at great length to dissect the evidence of Minturn, Gilson, Gourley, Connor, Hubbard, and Shelmore. He contended that even supposing their testimony to be worthy of credence, Mr. Collyer did not lie under the imputation sought to be sustained by the prosecution, of having in any manner engaged in the control or management of the Henry Clay on the day of the calamity, and that, therefore, the twelfth section of the act of Congress did not, in the slightest degree, apply to his case; he commented with particular severity on the contradictions in Mr. Gilson's evidence. The facts which Gilson attributed to have taken place in regard to Mr. Collyer, at the time of the collision, were all facts which took place with reference to Mr. Ridder, and that this appeared plain and conclusive, there could be no doubt, for when he (Mr. Jordan) pointed to Mr. Ridder, and asked Gilson if that gentleman was Mr. Collyer, Gilson said it was he. From this fact alone, there could be no doubt but that Gilson did not know what he was talking about; Gilson might be an honest man, but he was a very unfortunate one. He, (Gilson) was a man who looked across a gangway ten feet wide, and through an engine twenty feet wide, and saw forty marked on the gauge-rod of the engine, which had no number at all upon it; Gilson was determined to leave an impression upon the mind of the jury that the vessel was carrying forty pounds of steam; and the reason was, because the carrying of this forty pounds of steam was a violation of duty, and beyond the amount allowed by the certificate. It was a maxim, that a lie would stick to a man as well as the truth, but that

fortunately it did not prevail in a court of justice. This was the description of evidence, in infinitesimal doses, by which the prosecution sought to prove that Mr. Collyer was managing the boat on July 28th. But he, (Mr. Jordan) would as soon think of fattening an ass on the east wind, as endeavour to fix Collyer as controlling the action of the boat on the day of the accident, by such desultory and unsatisfactory testimony. At this point of the learned counsel's speech, the court adjourned until ten o'clock the next day.

Mr. Jordan resumed his address to the jury this morning; the counsel for the defence had been aware from the commencement that they would have little occasion to make use of Mr. Ridder's testimony; that it was a plain, simple, continuous narrative of the whole journey from Albany to the fatal spot, unembellished, unadorned, uncontradicted, but in fact corroborated by everything in the case; all he said had, in fact, been proved by other witnesses, so that they had little occasion to make use of his testimony. He, (Mr. Jordan,) should use it but little, although his learned associate had thought proper to abandon anything like a justification of the conduct and position of Mr. Ridder, and to give him up a prey to the district attorney, to be pounced upon as a lamb is pounced on by a vulture. He, (Mr. Jordan) would now say a few words in his defence, not because his clients needed Mr. Ridder's evidence, but because he thought it unjust that any person should be so treated, who, by process of law, had been compelled, whether he willed or not, to come into court and give his evidence. He would show that the assistant editor of the New York Daily Times had not contradicted Mr. Ridder in any essential particular, but first he would express his regret that the counsel for the defence had not pertinaciously objected to the questions put by the district attorney, and doubtless, the decision of his Honour would have been to rule against it. In answer to the questions of Mr. Hall, Mr. Ridder said, "I cast no blame upon the officers; I said nothing about their firing up to a dangerous extent; now let them see what it was that the assistant editor of the Times swore it was Mr. Ridder did say." He expressed an opinion as to the cause of the fire, attributing it to an unusual firing; they made a hotter fire than was usual or necessary; thus the jury would see that while the witness said, "I cast no blame upon the officers, I said nothing about their firing up to a dangerous extent," all the assistant editor maintained was that Mr. Ridder "expressed an opinion" that there had been too much fire; he did not maintain that Mr. Ridder distinctly said so and so. Mr. Ridder could no more state the causes of conflagration than any one else could; no one could do more than surmise, whether it arose from a match being thrown down there, or a cigar, or whether it was that some fiend in human shape had thrown down camphine, which, running along the heated timber, would account for the flames firing up so suddenly, no one could do more than surmise; or whether by the engineer opening the doors of the furnace to damp the fire, instead of pulling the safety-valve; whether these things were so, Mr. Ridder and they all alike were in the dark, and could only surmise. Besides, the assistant editor did not swear that Mr. Ridder said the firing up, if he ever did speak of such a thing, had been done by the order or with the knowledge or consent of the officers; where then, after all, were the mighty contradictions? Mr. Hall next asked the witness, "Did you say anything about their continuing to race after remonstrance?" his reply was, "I did not." Now mark the words of the assistant editor, "He said that the officers were remonstrated with after racing." Mr. Hall's question, if it had been answered in the affirmative, would have been, "I said there was racing after they had been remonstrated with;" the assistant editor only said, Mr. Ridder said they had been remonstrated with after racing. Neither he nor any one else denied that there was racing at one particular point, but it had no connexion with the catastrophe which caused the loss of life. The next question of Mr. Hall was, "Did you not say there were no buckets there to extinguish the flames?" the reply was, "No, sir, I did not say exactly that; I said he used all the buckets there were;" that answer might certainly imply that there were buckets, and doubtless they were used until it was seen that they were of no use; and if they had ten thousand buckets there, they would not have been of any use, for the steamboat went off almost like a charge of gun powder. So much for Mr. Ridder, a man who certainly had told a plain, consistent, orderly narrative of the transactions of that lamentable day; so far as he, (Mr. Jordan) could discover, without passion or prejudice in heart, he being, to a great extent, one of the sufferers, although he had not lost his daughter: doubtless, however, he had not considered it just that those men should, without cause, be so universally condemned, particularly when he saw the meeting so gravely passing a resolution, sending forth to the world a statement that they had not been contented with the usual firing up on board, but had burned tar, and resin, and pitch, and other combustible material. It was for opposing that resolution, too, that the engineer, who, having been down to the boilers after the catastrophe, and seen the marks of the quenched anthracite coal, knew that there was no other fuel used, was threatened to be thrown out of an upper story window; he, (Mr. Jordan) did not know who led that indignation meeting, but he had been informed that it was a particularly precious individual for such occasions, though he would not mention

his name: and doubtless, if a resolution had been proposed, which alleged that the officers had got the devil from hell chained down below, vomiting up fire and brimstone for the burning of the steamboat, it would have been passed, and if it had, it would have been just as reasonable as the infernal one that the murderers, for such they would have been, of the Henry Clay, had been firing it up with tar and resin, and God knows what. He then proceeded to comment upon the evidence for the prosecution, saying, in the course of his allusions to the different witnesses, that he did not like the cut of Mr. Minturn's jib. That gentleman had attempted to impress upon the jury, that a passenger was refused to be landed at Bristol, because of the boat being in such a hurry; whereas, on cross-examination, it turned out that he was nothing more than a drunken loafer, who was making a disturbance on board, and had made no demand at all to be landed until after the boat had passed the place. Dr. Wells he designated as a "do-no-harm, do-no-good sort of a man;" and declared that he, (Mr. Jordan,) could from personal trial contradict his statement about the particles of anthracite coal as large as peanuts. He had tried with a newspaper to brush away such pieces, and could easily remove them in that way; nay, he could do so with a cambric handkerchief; but he could not remove flat pieces of coal, such as might be naturally expected to pass from any smoke pipe, and which were doubtless the kind that were blown over the decks and the awning of the Clay on the day in question. He held out to the jury as a guiding polar star in this case, the consideration that they must positively find that the deaths in question were occasioned by the act complained of, though it might not be necessary that the act complained of should have been perpetrated just at the time of death; still the last must be clearly traced to it; as clearly as ever the effect was traced to the cause. He maintained at some length, that this could not be done in the present case, even according to the evidence for the prosecution. He concluded by expressing a hope that the magnanimity of the district attorney's nature would, despite his employment by the government, compel him not to do any injustice, even though he possessed the power, to those men who would stand that day in peril, if it was not that they relied upon the intelligence of the jury. Mr. M'Mahon, after the able and eloquent addresses of his associates, declined addressing the jury.

Mr. J. Prescott Hall, for the United States, closed summing up, and said:—

May it please the Court, Gentlemen of the Jury:—This is now the fourteenth day that you have lent your attention patiently to the investigation of the facts in this case. I will not abuse that patience by any protracted examination of the testimony, but will endeavour to state as briefly and clearly as I can, the law which is applicable to the case which is now before the court and the jury, and the evidence which the prosecution has adduced to support it. In endeavouring to discharge my duty, gentlemen, I shall make no effort to go beyond the proper limits, although I shall, on this occasion, discharge it without pain, because I, as a man, think that gross misconduct exhibited itself on the part of the officers of the Henry Clay, on the fatal 28th of July, 1852. I will not endeavour, by any effort to strain the testimony, nor shall I be willing to fall one inch short of it, for I conceive that by my duty to the government, as prosecuting officer, I am required without fear, and without favour, and without regard to the particular individuals who are charged, that I should discharge that duty, in the best manner I am capable of. By the constitution of the United States, the commerce of the whole country is placed under the control of Congress. The Supreme Court of the United States have, on many occasions, decided that the word "commerce," as used in the constitution, included navigation also, and that therefore the whole navigation of the United States, as well as the whole commerce of the United States, are under the jurisdiction and supervision of the people's representatives in Congress assembled. At the time the constitution went into effect, and for many years thereafter, the mode of propulsion adopted on the rivers of the United States, was such that the intervention of the powers of the law was not called for to check any abuses, or to guard people in their rights; but after the discovery of that mighty and potent engine, which was thereafter to be used on all the navigable waters of this country, and perhaps of the globe—after these potent energies had been brought out, and applied to the propulsion of steam vessels, it was discovered by experience that great want of care had been exhibited on so many occasions, that the people of the United States were not safe, in the prosecution of their ordinary business upon the water courses of the United States, unless they were in some degree protected from the acts of those who were their transporting agents; and, so serious had this whole matter become, that Congress, in 1838 passed a law upon this subject, which is significant in its very title. It is entitled "an act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam." It proceeds, then, to give a set of rules, which are to govern the conduct of those who are charged with guarding the lives of passengers on board of the vessels which they control, and which rules they have no right to disobey or disregard. And, in order that the utmost vigilance should be exerted, it is provided after the passing of this act, that no vessel

shall be permitted to navigate the waters of the United States, unless they take out a license, under the conditions which are imposed by the statute—that in the first instance the district judge should appoint competent persons to inspect the boilers, and all hulls of the steam vessels; that the hulls of the steam vessels shall be inspected once in twelve months, and that the boilers shall be inspected once in six months, and to disregard this, is visited with the severe penalty of the law. He then referred to that section of the act, which made it the duty of the officers of vessels to let off steam at every landing place, or whenever the headway of the vessel should be stopped, and in support of this he cited Judge Betts, in the case of the *Reindeer*, to show that it was imperative, and that the captain had no discretion. But Congress, not deeming the act stringent enough, passed the following statute:—Section 12, and be it further enacted, that every captain, engineer, pilot, or other person, employed on board any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his, or their respective duties, the life or lives of any person, or persons, on board said vessel may be destroyed, shall be deemed guilty of manslaughter; and, upon conviction thereof, before any circuit court in the United States, shall be sentenced to confinement at hard labour, for a period not more than ten years.—If this statute is to be applied to the poor fireman or deck hand, much more is it to be applied, to masters and owners on board the vessel, who take part in the navigation, and to the pilot in the wheel-house, and the engineer in the engine room.—Upon these persons rests the responsibility, and respectable as they are, intelligent as they are, there is less excuse for their neglect of any duties which the law casts upon them, to have been the cause of this terrible calamity. What, because Mr. Collyer's ship yard is to be shut up, is he to be held irresponsible for such acts? The whole theory of this case rests upon the charge of mismanagement and negligence. I will state the theory that has been adopted by the prosecution in this matter. We suppose that this terrible accident occurred in consequence of the misconduct of those having charge of this vessel on the 28th of July. It is in evidence here, that the steamboat *Reindeer*, which used to be the *Race-horse*, upon the North river, with the *Henry Clay*, had become disabled, and it was necessary to have some boat to take her place. The *Armenia*, a boat of about equal speed with the *Henry Clay*, was selected for that purpose. She was to sail on the 27th of July, bound from New York to Albany; but with a very cunning regard to their own interests, the owners of the *Henry Clay* had made a secret contract with those who were to navigate the *Armenia*, that the *Armenia*, was to lie behind the *Henry Clay*, and that the *Henry Clay* was to be permitted to go to all the docks ahead of the *Armenia*, take in the passengers that first offered themselves, carry them to Albany, and deliver them there, and that on the return down, the same course of conduct should be pursued. It is in evidence that this arrangement became displeasing to the charterers of the vessel. They therefore took Captain Smith from his command, and gave the vessel in charge of Captain Polhemus, and placed another individual on board to direct him in her management. After the vessel had departed from Albany, it was supposed on the part of the officers of the *Henry Clay*, that this same arrangement was to be persisted in, and there was no reason to suppose that this arrangement would not be kept up until after the *Henry Clay* came to Hudson. When she came to Hudson, it was then discovered that the *Armenia*, in apparent violation of the arrangement which had been made between these vessels, instead of following the *Henry Clay* to Hudson, had gone down the west passage, avoiding the landing at Hudson, and made directly for Catskill. The instant the *Henry Clay* discovered this, it became the subject of conversation between the passengers, and it was so admitted that when Mr. Collyer was asked whether the *Armenia* would pass the *Henry Clay*, the answer given by Collyer was, that he thought she would not. The learned counsel here entered upon a critical examination of the testimony introduced, and contended that the prosecution had clearly proved that the vessels were engaged in a fearful contest of speed, the results of which were the destruction of the *Henry Clay*, and the fearful loss of life: such being the case, he called upon the jury to pronounce a verdict of guilty against the defendants—particularly Collyer and Tallman, who were in a position of life which should have prevented them from doing that which they knew was contrary to law. The question which the jury had to determine was one of the greatest importance to the community, who were looking with intense anxiety to the result of the present trial. Mr. Hall wished to ask whether there was any validity in an act of Congress, or whether it was null and void. If the former proposition was correct, the defendants must be convicted—if the latter held good, they would be acquitted.

His Honour, Charles A. Ingersoll, charged as follows:—

Gentlemen of the Jury: There is a prospect that we shall now bring this protracted trial soon to a close. It has occupied a very considerable portion of your attention; but not in my judgment more than was due to the transaction which had to be investigated. I am glad to be able to say, gentlemen, that you have thus far exhibited that patience, and given that attention which the case requires. It has been intimated, during the

progress of the trial, that injustice had been done to these individuals under trial, from the fact that they were not enabled to have separate trials, for the reason that if they had had separate trials, the testimony of those not on trial, might have been used in defence of the others who should be tried. In the examination of this question, when the motion was made for separate trials, I gave my reason why separate trials should not be granted, and I will again state in this place, gentlemen, that as they have been indicted by the grand jury jointly, if they had been permitted to have had separate trials, the one who should have been tried first could not have called upon the others to testify in his defence. That is the law, it has been so decided, upon solemn argument by the Supreme Court of the United States, and to that decision we must all bow. I therefore say, gentlemen, that if they had been permitted to have separate trials, the one who should have been first tried would not in law be permitted to call upon the others to testify in his defence. In the year 1838, the Congress of the United States, in view of the many startling disasters which had happened upon the waters of the United States, to vessels propelled by steam, by which great loss of life had been occasioned, passed a law, the object of which was, as appears by its title, to protect the lives of passengers on board vessels of that description. That law, among other things, provides;—That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel, propelled in whole, or in part by steam, by whose misconduct, negligence, or inattention to his, or their respective duties, the life or lives of any person, or persons on board said vessel, may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any circuit court in the United States, shall be sentenced to confinement at hard labour, for a period not more than ten years. The indictment which you have to pass upon is founded upon this violation of this act of Congress. It charges that Thomas Collyer, John F. Tallman, John Germain, Edward Hubbard, James L. Jessup, and James Elmen-dorf, the parties now on trial, in July, 1852, were employed on board the *Henry Clay*, a vessel propelled by steam, and navigating the waters of the southern district of New York; and that while they were thus employed, the lives of several passengers on board the vessel were destroyed by their misconduct, negligence and inattention to their respective duties. To the charges set forth in the indictment, the individuals named therein and against whom the charges were made, have severally pleaded, that they were not guilty. The question, then, at issue, and upon which you, upon your oaths, have to determine, is, whether they are guilty, as charged in the indictment; and to enable you to come to a correct result, it is necessary that your attention should be directed to certain inquiries which are involved in the question at issue. These inquiries are; First, whether the lives of the persons named in the indictment, or the lives of any of them, have been destroyed? secondly, whether they have been destroyed by the misconduct, negligence, or inattention of any one? Thirdly, whether the individuals against whom the charges in the indictment are made, were employed on board the *Henry Clay*, at the time such lives were destroyed; and fourthly, if they were thus employed, whether such lives were destroyed by his, or their misconduct, negligence, or inattention to his, or their respective duties? And in considering the case now to be submitted to you for your determination, it is important, that you may come to a just conclusion, to bear constantly in mind certain rules of law, which should govern trials in all cases involving in their consequences a punishment that is infamous—which should govern them in all criminal investigations, and particularly in those investigations which are of an aggravated character. These rules are, that every one accused of crime, whether the offence charged be one of commission or omission—whether it be criminal or culpable neglect, shall be presumed to be innocent until the contrary appears. He should be considered as innocent until his guilt is made appear manifest, by evidence given in court, and when, upon evidence given in court, there is in the minds of the jury a reasonable doubt of the guilt of the accused, no matter what the charges may be, he who is accused should have the benefit of that doubt. By the law which governs this court, and which also governs all well regulated courts, he who is in an indictment charged with crime, is not called upon to establish his innocence. That duty is not imposed upon him. His innocence is considered to be established, until by convincing proof brought forward in court that presumed innocence is destroyed. It is the duty of the government to convince the jury, beyond a reasonable doubt, of the guilt of him who may be indicted, and not the duty of the accused to convince them of his innocence; and if the jury are not convinced beyond a reasonable doubt of the guilt, then it is the duty of the jury to acquit. The disaster which gives rise to this prosecution, at the time at which it occurred, deeply excited the feelings of the community; and the public mind, for a considerable period—was in such a state, that if the trial of those implicated—or, I should rather say, of those supposed to be implicated, had taken place soon after it happened, there would have been some danger, and, I may add, there would have been great danger, that that calm and dispassionate investigation might not have been given to the investigation of the truth, which is due to all subjects of inquiry in a judicial tribunal, and particularly to a subject demanding so much impartial investigation as the one now

to be submitted to your determination. But that excitement has now passed away, and you as impartial jurors sworn to a faithful discharge of your duty, have been selected to pass between the government and the accused, and I have no doubt that the duty which devolves upon you will be faithfully performed. I have told you what duty devolved upon the government, before they could claim a conviction. It is also incumbent upon me to state what is not required of them, and what is no part of their duty in conducting the prosecution. It is not required of them to prove wilful or intentional mismanagement or misconduct on the part of the accused. In a prosecution of this kind, it is not the intent which constitutes the essence of the offence, but it is an improper act, although unaccompanied with any evil intent or negligence, in the performance of a proper act, or inattention to any duty imposed upon any captain, engineer, pilot, or other person employed on board any steamboat or vessel, propelled in whole or in part by steam, when by such improper act, or negligence in the performance of a proper act, or inattention to any duty imposed upon such captain, engineer, pilot, or other person, the life of any person on board such vessel is destroyed, but there must be some improper act inconsistent with the faithful performance of duty, or negligence in the performance of a proper act or inattention to some duty imposed upon such person, and the death of some person on board a vessel in consequence thereof, before there can be a conviction, there must be not only such improper act, or negligence, or inattention, but there must also be a death of some person on board, as a consequence of such improper act, negligence or inattention, and if these are proved it is unnecessary to inquire whether or not the accused had any wrong intention; but although such improper acts and negligence, inattention and death are proved, yet if such death was not in consequence of such improper acts, or negligence, or inattention, there can be no conviction. To make myself understood, gentlemen, the law of Congress makes it necessary, or rather makes it the duty of every captain, at every landing place to blow off steam. If he does not blow off steam, that is misconduct, or negligence, or inattention to his duty; but if, subsequently to that time, a death occurs on board of a boat, and it is not attributable to that cause, although there may have been misconduct, negligence or inattention, there can be no conviction, for the death is not connected with the act complained of, and which is said to be misconduct or negligence; and if there were death, and such a death were in consequence of some misconduct, negligence or inattention by some one employed on the vessel; if these defendants are not chargeable with such misconduct, negligence or inattention, and if there is not proved to your satisfaction, that they have been guilty in this respect, there can be no conviction, in other words, if there has been a death, and such death has been occasioned by the misconduct or negligence of some other person, other than those; if those persons have not been guilty of negligence, or such misconduct or negligence as caused that death, or contributed to it, then they cannot be convicted. Those who conduct this prosecution do not claim that these defendants, or either of them, intended the death of any one on board the vessel. There is no necessity that they should. They are not accused of any wilful design to take the life of any one. The indictment is not pressed upon that ground, but, as I have before intimated, it is pressed on the ground that the lives which have been lost, were lost by the misconduct, negligence or inattention of the defendants. In an action in favour of any passenger on board the *Henry Clay*, at the time of the disaster, against the owners or captain of the boat, for any injury to his person, or to his property, the mere fact of such injury, caused by the burning of the boat, would be sufficient, if there was nothing else in the case, for the jury to say, and they would be bound to say, that the boat was destroyed by negligence, so as to make the party defendant liable for the damage claimed in consequence of such burning. In such a case, from the fact of burning, negligence and misconduct are presumed, and the defendants would be liable for the negligence, unless they proved affirmatively, that the fire was not caused by negligence or misconduct; for from this fact, the law takes it for granted that the defendants are guilty; and to prevent a verdict against them, they must prove their innocence. This, gentlemen, is the rule in a civil case, where a party brings a suit for the recovery of damages; but this is not the rule in a criminal case, such as you are now about to determine. In a criminal case there is no such presumption against the defendants which they must remove, but all the legal presumptions are in their favour until the contrary is proved; and the death claimed to be in consequence of any misconduct or negligence, must be proved to be, before a conviction be had, the direct consequence of the mismanagement and negligence complained of, and if it is not the direct consequence of the misconduct or negligence complained of, a conviction cannot be had. As in the case cited by the counsel from the books, where an individual placed a loaded gun in the corner of the room, and another person not knowing that it was loaded, takes it up and innocently snaps it, by which it is discharged, and causes the death of some one, there would be a death, and there would be negligence on the part of him who placed the loaded gun in the corner of the room. If there had not been that negligence, there would not have been a loss of life, but that negligence would not be the immediate

cause of the death. The negligence did not directly produce the death. It could not produce it without the act of some other person, and as the death was not intended by the person who was guilty of the negligence in so placing the loaded gun, and as the death was not the immediate consequence of such negligence, and would not have taken place, but for the act of another person, the party guilty of such negligence would not be responsible for that death; but if the negligence or improper act complained of, be the sole cause of the death—if it causes or produces the burning of the vessel, and such burning of the vessel cause the loss of life, then such loss of life is the direct consequence of such negligence or improper conduct, and the party guilty of the same is liable to the punishment imposed by the act of Congress, upon which this prosecution is founded. An error of judgment merely, gentlemen, is however not sufficient to fix such misconduct or negligence upon the person against whom such error of judgment is proved. The law of Congress did not intend to punish a mere error in judgment. What was meant by misconduct, negligence and inattention, in the law of Congress upon which this prosecution is founded, is well expressed by the learned judge, in his charge to the jury, in the case of the *United States v. Farnham*. I, in substance, use his language. By misconduct, he says, "negligence, or inattention in the management of steamboats, is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it is slight or serious, if the proof satisfy you that the setting fire to the boat was the necessary or most probable cause of it."—Bearing these rules of law in mind, you will turn your attention to the issue of the question which must be determined by you, in order that a correct decision may be had of the issue which has been framed, between the government and the parties now on trial. The first question is, were the lives of any persons on board the *Henry Clay*, destroyed by the disaster which happened to her on a trip from Albany to New York, in 1852? It is admitted, and the proof is full, that there were a number of those who were passengers on board the boat, perished in consequence of the sad catastrophe, the details of which have been repeated during the progress of the trial—some were destroyed by the fire, and some, attempting to escape from this devouring element, perished in the water. The next question is, were these defendants persons employed on board the boat, having duties to perform connected with her management and navigation? For whatever negligence or mismanagement there may have been, and however much the death of the persons destroyed may be connected with any negligence or misconduct, which may be claimed to be chargeable to the defendants, or to any one else, these defendants are not responsible for such misconduct or negligence, unless they were persons employed on board the boat, having duties to perform connected with the management and navigation of the boat. It is admitted that John F. Tallman was the captain of the boat. The captain has generally the command of the boat. All on board performing duties are under the authority of the captain, whoever he may be, and they are subject to his orders. It is admitted that James L. Jessup was the captain's clerk, and among his duty or duties, was the collecting of fare and giving tickets, and of acting as the assistant of the captain, under him. John Germain was the engineer of the boat. His duty was confined to attending to the engine, regulating and directing it, and having control of the fireman. Edward Hubbard was the pilot of the boat, and his duty was to direct the course of the boat. James Elmendorf was the assistant pilot, and his duty was to assist the pilot, to act under him, and in his absence to take his place. But it is claimed that Mr. Collyer, a part owner of the boat, and on board of her at the time of the disaster, was not a person on board of her having duties to perform, connected with her management and navigation, and if he was not, he cannot, under any circumstances, be liable to this prosecution. It is claimed on the part of the government, that he was such person, who at the time of the disaster was on board having such duties to perform, and that he was, for the time being, the captain of the boat. It is unnecessary, by the law upon which this prosecution is founded, to make a person come within its meaning, that he should be employed under pay to perform any particular duty; but if any person acts as captain for the voyage, or for any particular time is engaged or act as captain, or for any cause takes the place of the captain, and for the time being acts as such, he is, within the meaning of the law, the captain of the boat, upon whom is imposed the duties of captain. The question then is, did Mr. Collyer, on the trip from Albany, on the 28th July, 1852, act for the time being as captain of the boat? Did he take the place of the regular captain? If he did, he was employed within the meaning of the law as captain on board the boat. Proof that certain things were done upon his advice, or upon his suggestion merely, would not be sufficient to establish the fact that he was for the time being acting as captain. Nor is it sufficient that he should have passed an opinion, whether asked or unasked, as to the safety or risk of a particular movement of the boat, or of the danger of the mode by which the boat was manag'd. He must, at least, assume to exercise the control and the authority of the captain to take the command, and no opinion which he may pass, or suggestion that he

may make, unless he has a duty to perform on board the boat, will make him an officer, or a person on board of the boat having duties to perform within the meaning of this act of Congress. The government say that they have proved, upon the trip in question, that Collyer was captain of the boat, and they rely upon certain witnesses whom they have called. The principal witnesses are Minturn, Gilson, Gourley, Connor, Hubbard, and a witness from Philadelphia, whose name I do not remember. Most of these witnesses do not speak of any order which Collyer gave. Mr. Minturn speaks of an opinion which he (Collyer) gave as to the danger of the boat; and others speak of suggestions which he may have made as to the bell, and others speak of his being on board the boat, displaying great activity. This, gentlemen, will not amount to much, to prove that he was captain; and according to my recollection there was only one witness, and that was, I think, the witness from Philadelphia—I may be mistaken, and if I am bear it in mind, (addressing the counsel) who says (turning to the jury) that Mr. Collyer on that occasion, admitted himself to be captain, and it is claimed on the part of the defence, that this individual is not to be credited; but if without particularly pointing out the testimony which is relied on upon the one side or the other, you should be of opinion that he was, for the time being, captain of the boat, having control of the same, and having command of the same, he would, if the boat was destroyed by negligence, and those lives were lost, be responsible under this act of Congress.—The next question, and the great question in this case is, was there misconduct, or negligence, or inattention to duty, on the part of those who had the management of the boat? Were the officers justly chargeable with misconduct, negligence or inattention to their duties as such officers, by which the disaster took place, and in consequence of which, the numerous lives were lost, which were destroyed on that occasion? To justify a conviction, a neglect of the duty imposed upon the defendants, and which it is incumbent upon them to perform, or some misconduct in the performance of that duty, must be proved, by which, as a consequence, this disaster took place. It must be proved that they have done that which they ought not to have done, or done improperly, and in a negligent manner, that which they ought to have done in a proper and careful manner, or that they neglected to do that which they ought to have done, by which the disaster occurred, and which disaster would not have occurred had it not been for such misconduct, or negligence of duty. And if the fire occurred by the neglect of a particular person on board the boat, in the performance of his particular duties, and not by the neglect of duty or misconduct of others, he only by whose misconduct or neglect of duty the disaster occurred is responsible for the consequences. The government claim that there was negligence of duty, and misconduct upon the part of each of the defendants, by which the disaster took place, and, as a consequence, the loss of life that took place. They claim this misconduct and negligence in two particulars. First, in so conducting, and in so neglecting to conduct before the fire, that the fire on board the *Henry Clay* took place as a consequence thereof. They claim, in the second place, that there was negligence and misconduct in these defendants, in their so conducting after the fire took place, in running the boat on shore, and in neglecting to attend to the safety of the passengers after the boat was turned to the shore, and after she had already reached the shore, and also by the order that was given to go aft, and that by such latter misconduct and negligence, the loss of life took place. By the testimony of Mr. Belknap, a most intelligent witness—as intelligent as any witness that I have ever seen upon the stand in a court—it appears that the *Henry Clay* was one of the best boats recently built in the city of New York. By his testimony, it appears that her hull was built in the most substantial manner; that she was so constructed that there was as little danger from fire, as there would be on any boat navigating the North river; that she had one of the best engines and boilers; and, as admitted by the government counsel, she was officered by men whose character and whose skill stood fair in the community, and deservedly high. She had a skilful and prudent captain, it is admitted; she had a skilful and competent engineer; an experienced and competent pilot, and assistant pilot. She was well officered and manned, as it appears, by four firemen, and there is no claim, but that that number was her full complement. On her trip from Albany she took fire, as has been stated, near a place thirteen or fourteen miles from the city of New York, and the question, gentlemen, is whether that fire was caused by the negligence of those individuals now on trial, or the negligence of any of them. If it was caused by the negligence of one, and him only, he alone is responsible. If it was caused by the negligence of the whole of them, they all are responsible. If it was caused in a manner that is not accounted for, unless it is proved to your satisfaction that it was caused by the misconduct or negligence of these defendants, then it would become your duty to acquit. What is the theory on the part of the government? The theory is, that from Hudson, on that day the vessel was put under an excessive rate of speed. In other words that she was engaged in a race with the *Armenia*, and to produce that excessive rate of speed, an excessive quantity of fuel was applied to the furnaces, and that in consequence of that excessive quantity of fuel thus applied, and the manner that it was applied, by the negligence of

these defendants,—as a consequence of that, this boat took fire. Now, gentlemen, when they arrived at Kingston, it is evident that there was a great alarm on board this boat in consequence of that collision; but can you trace that collision as a cause for the burning of the boat eighty-three miles below? If you cannot say that anything that took place was the cause of the burning of the boat eighty-three miles below, then, although you should be of the opinion that there was misconduct or negligence, these defendants would not be responsible, unless you can say that the burning of the boat was in consequence thereof. But the government go further, and if their theory is right, then it would undoubtedly follow, that the burning was attributable to the causes assigned by them. The government claims, gentlemen, that at Hudson the racing commenced—that this intense fire was then applied; that it was kept up down to Kingston, and that after the boat left Kingston, it was continued, in order to keep up the race; and that it was so continued up to the time it was discovered that the boat was on fire, and then it had arrived at such a heat that the fire was communicated from the furnaces in some way, to the boat,—by the misconduct or negligence of these men. They claim that there was a race. If there was no race, then the theory of the government fails; and the question for you to determine is, was there a race at the time that the fire was discovered, or for any considerable portion of the time previous thereto; if there was a race six or eight hours before, and if you cannot connect the fire with that race six or eight hours before, then you cannot say that these defendants are guilty under this act of Congress. It is not claimed, on the part of the government, that there was any combination beforehand to have this race. Indeed it is affirmed that the understanding between the boats was at the time they went up, that the Clay should take the lead, and that the Armenia should follow, and that no one had any idea of race. If this is the true theory, I do not see what reliance can be placed upon the testimony of one witness examined here—I mean the fireman who left the boat. He purposes showing that it was intended to be a race in coming from Albany to New York, and he testified that Captain Tallman, as he went up from New York to Albany, said when the Armenia came out of the dock, that “he would beat her going up and coming down.” There must be some mistake on this subject. If there was an understanding that there should be no race in going up at that time, and no race in coming down; and if the theory of the government is, that the race selected is from Hudson, what that witness said as to the fear he had in going up, and as to what he said to Mr. Tallman when the boat was leaving the dock at Albany, would have little weight, because from the theory of the government, at that time the race was not contemplated.

Was this race continued and the fire kept up, so that it was in an improper manner communicated to the boat? We are not able to ascertain exactly how much steam was carried on this occasion down to New York. One witness said he thought he saw forty pounds marked up; one said it was seventeen or twenty pounds, and to my mind it was not very satisfactorily accounted for what it was. If Mr. Belknap, the builder of this boiler, is correct in his statement that the vessel could not carry more than thirty-one pounds of steam, without the steam blowing off; then it follows she could not have had more than that, unless the government make out that the safety-valve was tied down, so that the steam would not blow off. What is the proof upon the subject that the Clay carried an excess of steam? The fact is well established, as I understand it, that her ordinary time of arrival was at three o'clock or soon after; this accident happened thirteen, fourteen, or fifteen miles above there, a little after three o'clock; then, if three o'clock was the ordinary time of her arrival in New York, at her ordinary speed, there could not have been very extraordinary speed in driving her down as far as Yonker's at the time she ordinarily arrived in New York. What is the evidence upon the subject of this negligence? for there may be negligence even without an extraordinary rate of speed. The fire was discovered in a certain part of the boat that has been pointed out. She had a short time before been inspected. In June previous, the hull inspector declared her to be complete, so far as the hull was concerned, a complete and safe boat for the navigation of the Hudson. The inspector also declared her boilers complete and sufficient for the thirty pounds of steam which Mr. Curtis says he allowed her to take. She was then declared by these men as a competent boat. How did this fire originate? You have only the testimony of one of the firemen, but the other is all surmise. He tells you how it was. You may believe other witnesses rather than the fireman, but you have got to establish the fact that it was in consequence of the misconduct of these defendants, before you can convict them. It was discovered at a particular point; efforts were made to put it out, but these efforts were unavailing, and the result was such as has been testified to. I will not occupy more time on the subject whether the negligence was proved or not; it is emphatically a question for your determination. If there was no negligence or misconduct, then of course these defendants cannot be guilty of misconduct or negligence. If there was negligence or misconduct by others, and in consequence of that the fire was communicated to the boat, these defendants would not be responsible for that

negligence. For instance, to make myself understood, here is a pilot whose duty is to direct the course of the boat; he is a faithful man; he is intrusted with the boat to direct her in her course, but for some reason or other he wilfully drives her upon a rock and lives are lost; that would be misconduct in him, but it would not be misconduct in the captain, for the captain has done all that a prudent man could do to employ a competent pilot with a good reputation. So it is in case of a fireman; if a captain has employed competent and faithful firemen, and if they, by their negligence caused a fire, then, in my judgment, the other officers would not be responsible for it, because the captain has done everything a prudent man can do; he has appointed faithful and reliable men, and if those men abuse their trust without any fault on his part, the captain, in my judgment, would not be liable under this law; he and every one is responsible for his own negligence. But in the case I put of a pilot, who was employed as a faithful man; if he abuses the trust confined in him, the captain would not be liable for that abuse, but the pilot himself alone. Was there any further negligence in running this boat a-hore and in so conducting matters after the boat had struck the shore that the lives of these passengers were lost? The proof is abundant that this boat was run ashore in the best possible manner. All the witnesses agree upon that subject. All the nautical men,—landsmen would not understand it as well,—all the nautical men brought on the part of the government, say that the vessel was run on the shore in the best possible manner. Were these defendants then guilty of negligence or misconduct after the Clay got on shore? There was an order given to go aft, and it has been explained to you by the defendants why such was a reasonable order. She struck the shore, and it seems that those who had presence of mind about them, who were aft at the time she struck the shore, escaped; and I was never more struck in my life with the necessity of presence of mind, than I was when some of these witnesses were testifying, particularly Dr. Wells, who says he was aft in obedience to the order, and that he remained aft until she struck the shore, and the females whom he had under his charge had passed forward and escaped to the bow, and he then passed on. Mr. De Peyster did the same, and probably others. But others were panic-stricken, and most people are so on an occasion when they are every moment in danger of perishing either by the water or flames. Then, gentlemen, it appears that these defendants, when the vessel struck the shore, were in the water endeavouring to save lives. Were these officers guilty of any misconduct or negligence in not saving more lives? Upon this subject I will say, as I said in opening my charge, that an error of judgment merely would not make them culpable. The evidence is abundant that they exerted themselves to save those who were in the water. What men generally would have done, under such circumstances, we do not know. Whether they directed their attention to save this class, or that class, we are not certain. If you think that in what they did there existed an error of judgment, then, gentlemen, you cannot convict them. If, however, they were guilty of misconduct or negligence, or inattention to their duties, such as I have described it to you to be, then, gentlemen, you will be authorized to convict.

With these remarks you will take the case under your consideration, and return such verdict as you, in your proper judgment, may think proper.

One thing I have omitted to notice: It is admitted, on the part of the prosecution, that these defendants were perfectly skilful in their several professions, and their private character was good. This circumstance, although it will not overcome evidence when it is positive, yet, in balancing the case, it will go a great way to turn the balance in favour of the accused. The case rests with you, gentlemen.

The learned judge concluded his charge at ten minutes past three o'clock, after which the jury retired to consult.

At twenty-eight minutes to four the jury returned, when their names were called over by the clerk of the court.

The Clerk. Have you agreed upon your verdict, gentlemen?

The Foreman. Yes.

The Clerk. How do you find?

The Foreman. Not Guilty.

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 - inferences of guilt not to be drawn from remote causes, 149.
 - how far party is responsible depends upon the degree of negligence at the time, 149.
 - where party throws or shoots over a house or wall, the act is unlawful, and the crime, if death ensue, manslaughter, 45, 150.
 - if death happen, in prosecution of felonious intent, the crime is murder; if in committing a bare trespass, it is only manslaughter, 150.
 - where there is a party combining to resist all opposers in the commission of any breach of the peace, if death ensue, through this unlawful purpose, they will be guilty of murder, 151.
 - if poison be laid in such manner as naturally to be mistaken for food, it is, perhaps, manslaughter; otherwise, misadventure only, 151.
 - where liquor is given for unlawful purposes, and death ensues, it is manslaughter; but if the purpose be great bodily harm, or to commit a felony, the offence is murder, 151. See "*Misadventure.*"
- New trial, whether, when granted on charge of manslaughter, the original charge of murder is opened, 287.

OFFICERS OF JUSTICE, homicide by.

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 - sentence to be strictly followed, 47.
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 - rule as to officer, varying punishment, 47.
- in effecting an arrest, 48.
 - general rule, justifiable, 48.
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- in civil cases, 48.
 - officer not to use lethal weapon, 48.

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- if there be resistance and affray, only manslaughter, 48.
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 - if the arrest is unlawful, the killing is not murder, 55.
- who have authority to arrest, 56.
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 - protection continues *eundo, morando, et redeundo*, 56.
 - policemen entitled to same protection as constables, 57.
- bailiffs, or tipstaves, in civil cases, 58.
 - in this class of cases, officer has no authority to kill, 58.
 - private or special bailiff, 58.
 - it must appear that the party knew him to be such, 58.
 - with sufficient notice, the killing of such officer is murder, 58.
 - private bailiff should show warrant, 58.
 - if demanded, bound to show at whose suit, for what cause, out of what Court, when and where returnable, 58.
 - authority limited by the writ and district in which he is to act, 58.
 - but if executed within the jurisdiction of the Court or magistrate, it is sufficient, though out of the vill of constable, if directed to him by name, or name of office, 59.
- officer acting out of jurisdiction, or without warrant, 59.
 - must be legal officer or his assistant, 59.
 - killing a bailiff executing writ out of jurisdiction does not amount to murder, 59.

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- writ to be executed within jurisdiction of magistrate from whom it issues, 59.
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- as in driving off poachers, 60, 61.
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- if, after such notice, bailiff be killed, it is murder, 61.
- bailiff, *juratus et cognitus*, need not show warrant of being bailiff, though demanded, 61.
- if constable command the peace, and show staff of office, this is sufficient intimation, 62.
- where known to defendant as officer, killing is murder, 62.
- if constable interfere to prevent an affray in his own vill, if he be killed by one who knows him, it will be murder; if by stranger, manslaughter, 62.
- by whom a warrant may be executed, 62.
- by party named in it, 62.
- or by some one assisting, either actually or constructively, 62.
- how long a warrant continues in force, 63.
- until fully executed, if within seven years, and magistrate be living, 63.
- when process is illegal, 64.
- when process is illegal, the killing of officer is manslaughter, 64.
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- if officer has two warrants, one legal, the other illegal, and arrest by the illegal, he may justify by the legal one, 65.
- if directed to arrest A. B., and he arrest C. D., it is illegal, 65.
- legal completeness necessary in warrant, 66.
- omission of Christian name, 66.
- falsity of charge, no alleviation for killing officer, 67.
- if warrant, in name of State, have *no seal*, it is void, 67.
- if officer, in executing such warrant, is killed, it will not be murder, 69.
- blank warrants, 67.
- their illegality settled, in this country, 67.
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- where the arrest is made without any warrant, 68.
- not only officers but private persons, are empowered, under certain circumstances, to make arrests, 68.
- an officer may, without warrant, arrest on charge of felony, 68.
- and if the officer be known to the party, his killing would be murder, though no felony was committed, 68.
- how affected by statute, 69.
- the authority should be strictly pursued, 69.
- where there is reasonable suspicion of felony, and charge made, 69.
- ship's officers, 71.
- where officer impresses without special warrant, 71.
- where sentinel shoots a man approaching a ship, though ordered not to do so, 71.
- such proper case for pardon, 71.
- private persons.
- coming to aid of officers, 71.
- assisting to keep the peace, 71.
- aiding officer in taking felon to station-house, 71.
- eundo, morando, et redeundo*, 71.
- justified in bringing felons to justice, 72.

Officers of justice, homicide of—(*continued.*)

- preventing felonies, 72.
- must be certain that felony is committed, 72.
- by the person arrested or pursued, 72.
- where clear case of attempt to commit felony, 72.
- indictment found, good cause of arrest by private person, 73.
- private persons interfering should express their intention, 73.
- if not, their killing will be but manslaughter, 73.
- in what cases, 74.
- felonies, 74.
 - if a felony be committed, 74.
 - or dangerous wound given, 74.
 - felon flying from justice, 74.
 - if hue and cry be made, all who join in arresting are under protection of the law, 74.
- misdemeanors.
 - no power in private person to apprehend, 75.
 - where private persons interpose in sudden affray, to part the combatants, their killing will be murder in the one who kills, but not in the other affrayer, unless he strike, 75.
 - the same doctrine applies to officers without warrant, 75.
 - even justice of the peace has no authority to detain a person known to him, till some other makes a charge, 76.
 - where life is threatened, a different doctrine, 77.
- affrays.
 - Sissinghurst case, 77.
 - constable no right to arrest, after an affray, without warrant, 79.
 - yet may interfere on his own view to prevent a breach of the peace, 79.
 - small matter will amount to notice, 79.
 - especially in daytime, 79.
 - at night, further notification necessary, 79.
 - important question, if the affray be over, 79.
 - no part of policeman's duty to turn a person out of an inn, although acting improperly there, unless his conduct tends to a breach of the peace, 80.
 - but noise and disturbance, such as would create alarm and disquiet, would justify policeman in interfering, provided it took place in his presence, 80.
- street-walkers and vagrants, 82.
 - the arrest of person at night as vagrant, if the person is innocent, is illegal, 82.
- when arrest may be made, 82.
 - not on Sunday, unless for treason, felony, or breach of the peace, 82.
 - but process may be executed by night, 82.
- officers taking opposite parts, 83.
 - the killing seems but manslaughter, 83.
- how arrests may be made, and herein of breaking open doors, 84.
 - where doors may be broken open, there must be previous notification, 84.
 - what is due notice, 84.
 - no precise form of words, 84.
 - where party arrested escapes into his own house, if the pursuit is immediate, notice is not necessary, 85.
 - in case of felony, or where dangerous wound given, the party's house is no sanctuary, and the doors may be forced after notification, demand and refusal, 85.
 - so, where a minister of justice comes armed with process, founded on breach of peace, 85.
 - officer may break open doors to execute process of contempt, 85.
 - and so on a *capias ulla-gatum*, or *capias pro fine*, or *habere facias possessionem*, 85.
 - so where forcible entry or detainer is found by inquisition, 85.
 - and also for levying penalty on statute, going in whole or in part to the king, 85.

Officers of justice, homicide of—(*continued.*)

but in latter case, the officer, if demanded, must show warrant, and suffer copy to be taken, 85.

bare suspicion of felony will not justify this extremity, 85.

unless there be warrant grounded on such suspicion, 85.

if there be a violent affray in a house, the doors of which are shut, and the constable demand admittance, and be refused, he may break open doors to keep the peace, 86.

also, if there be disorderly noise and drinking in inns, taverns, and alehouses, at night, the constable demanding entrance, and being refused, may break open doors to see and suppress the disorder, 86. this proceeding is founded upon the necessity of the measure for the public weal, 86.

in *civil cases* the doctrine, that a man's house is his castle, is admitted, 86.

if officer find *outward* door open, or it be opened from within, he may break open any inward door to execute process, 86.

if house is the house of a stranger, 87.

in case where outer door is in part open, 87.

principle only extends to the dwelling-house, 87.

this personal privilege is confined to the occupier or any of his family, not to a stranger, who can claim in it no benefit of sanctuary, 87.

where the doors of stranger are broken open, it must be at the peril of finding the person sought there, 88.

unless under sanction of warrant, 88.

officer cannot even enter, if door be open, into the house of stranger, to take goods of a defendant, but at his peril as to goods being found there, 88.

sheriff cannot break inner doors of house of stranger *upon suspicion* that defendant is there, to arrest him on mesne process, 88.

confined to *arrests, in the first instance*, 88.

where officers are *locked in*, they may justify breaking open the doors to regain their liberty, 88.

whatever is breaking in burglary, is breaking in the present connexion, 89.

how far third parties may resist, 89.

persons killed in endeavouring to keep the peace, 91.

or in preventing treason or felony, 91.

if party arrested make no resistance, but others attempt a rescue, the killing of the officers will be murder in them, but not in the party arrested, 91.

where constable arrests without warrant, 91.

where friend or servant assists the party resisting arrest, 91.

stranger interfering, 92.

Officers of vessels, negligence by. See "*Negligent Homicide*," and also U. S. v. Collyer, *App.* 483.

Old grudge. See "*Provocation*."

presumptions arising from. See "*Evidence*."

Opiate, death through undue administration of. See "*Negligent Homicide*."

PARENT, neglect of duties towards child. See "*Negligent Homicide*," "*Infanticide*." Passion. See "*Provocation*."

Peace officers. See "*Officers of Justice*," "*Fugitives*."

Peace, homicide in preservation of. See "*Officers of Justice*."

Physicians, negligence of, causing death. See "*Negligent Homicide*."

Place, how to be averred. See "*Indictment*."

Pleas. See "*Indictment*."

Poison, evidence of. See "*Evidence*."

how to be set out in indictment. See "*Indictment*."

Policemen, homicide of and by. See "*Officers of Justice*."

Premeditation, evidence of. See "*Evidence*."

Presumptions. See "*Evidence*."

Principals and accessories in homicide.

Statutes, 153.

Principals and accessaries in homicide.—(*continued.*)

United States, 153.
 Massachusetts, 153.
 New York, 154.
 Pennsylvania, 154.
 Virginia, 155.

Principals in the first degree, 155.

Principal in the first degree is the actor or actual perpetrator of the fact, 155.

Not necessary that he be present, 155.

As where one lays poison purposely for another, though absent when it is taken, he is principal in first degree, 155.

Not necessary that the act be done with his own hands, 155.

Sir William Courtney's case, 156.

If a child under age, or any other instrument excused from responsibility, be incited to commission of a felony, the incitor, though absent, is principal in the first degree, 156.

But if the instrument be aware of the consequences of his act, he is principal in the first degree, and the employer an accessary before the fact.

All who are present, aiding and abetting, in cases of *murder*, are criminals in the highest degree, 156.

but it is not every intermeddling that constitutes an aiding and abetting to the murder, 156.

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, 156.

One indicted as principal cannot be convicted as an accessary before the fact, 157.

Principals in the second degree, 157.

Those who are present aiding and abetting at the commission of the fact, 157.

There must be participation in the act committed and presence, either actual or constructive, at the time of its commission, 157.

Although a man be present, if he take no part, and do not act in concert, he will not be a principal in second degree merely because he did not endeavour to prevent the felony, or apprehend the felon, 157.

It is not necessary, however, to prove that he actually aided in the commission of the act, 157.

If principal be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless he do acts himself which render him liable as principal, 157.

Any participation in felonious plan, if there be constructive presence, makes principal in second degree, 157.

Act must be the result of the confederacy, 157.

On a charge of aiding and abetting, it is necessary to prove knowledge of intent of principal, 157.

In duelling, in strictness, both the seconds are principals in the second degree,

But all present at a prize fight are principals in the breach of the peace, 158.

One encouraging another to commit suicide, and present while he does so, is principal in the murder, 158.

Whether the advice was the *operative* cause of the suicide appears to be immaterial, 158.

There must be presence, either actual or constructive, 158.

He need not be actually present; if near enough to afford assistance, and intending to do so, he is constructively present, 158.

Persons not sufficiently near to give assistance are not principals, 158.

Presence during the whole transaction not necessary, 159.

All who assemble together with intent to commit a trespass, the execution of which involves a felony, and are present at the execution of it, and abetting it, are guilty as principals in the felony, 159.

Whether the deceased fell by the hand of the accused in particular or otherwise is immaterial, 160.

Principals and accessories in homicide—(continued.)

Malice in such killing is implied by law, 160.

The distinction between principals in the first and second degree, has been called a distinction without a difference; this is only so where the punishment is the same for both divisions, 160.

But where, by statute, the punishment is different, they must be indicted specially, 160.

If the actual perpetrator escape or die, those present and abetting may be indicted as principals, 161.

By ancient law, principal in second degree could not be tried until the principal had been convicted and outlawed, 161.

Such no longer the law, 161.

Principal in second degree may be convicted, though party charged as principal in first degree be acquitted, 161.

Anciently the person giving the fatal stroke was considered as the principal, and those present assisting only as accessories, yet it has long been settled that those present aiding and abetting are equally principals, 161.

It is competent for prosecution to offer confession of principal in first degree, 162.

Accessories before the fact, 162.

An accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, or abet another to commit such felony, 162.

The word "*command*" means, where one, having control over another, orders a thing to be done, 162.

To make a man accessory he must have been absent at time of commission of the act, 162.

If present, either actually or constructively, he is principal, 162.

Accessory is liable for all that ensues upon his command, counsel, or procurement, 162.

If different means from those commanded be used, yet is accessory liable, 162.

The procurement may be either direct or indirect, 162.

Concealment of felony to be committed will not constitute this offence, 162.

Nor will tacit acquiescence or bare permission, 163.

If procurer repent before the felony be committed, and countermand his order, he will not be accessory, 163.

So if he advise one crime and principal commit another, 163.

If the crime committed be not the direct and immediate effect of the act commanded, procurer cannot be deemed accessory to the crime, 163.

But if the crime committed be the same in substance with that commanded, and vary only in circumstantial matters, procurer is still accessory, 163.

At common law, conviction of principal must precede that of accessory, 163.

In Massachusetts, an accessory in a capital case cannot be tried at common law without his own consent, even where principal has died before conviction, 164.

But where there are two principals, one of whom is convicted and the other dead, he must answer, 164.

Conviction of principal is *prima facie* evidence of his guilt, 164.

The receiver of stolen goods, knowing them to be stolen, can be tried before or without conviction of principal, 164.

In general, however, the common law remains unchanged, 164.

Where principal and accessory are tried together, and principal pleads otherwise than general issue, accessory not bound to answer until principal's plea be determined, 164.

An accessory cannot take advantage of an error in the record against the principal, 165.

In South Carolina, it was held, that it was not necessary at common

Principals and accessories in homicide—(*continued.*)

- law, in an indictment against accessory, to set out conviction or execution of principal, 165.
- In Tennessee, held proper to sentence an accessory to same term of years as principal, 165.
- The indictment must state the offence committed with as much particularity as in indictment of principal, 165.
- Under the Criminal Code of Illinois, an accessory may be indicted and convicted as principal, 165.
- If felony is not committed, accessory not liable; but may be convicted for the attempt as a substantive misdemeanor, 165.
- Not necessary that accessory originate the design, 166.
- Accessories after the fact, 166.
 - An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon, 166.
 - The felony must be completed, 166.
 - The defendant *must know that the felon is guilty*, 166.
 - Doubtful whether *implied* notice is sufficient, 167.
 - The only relation which excuses harbouring a felon is that of husband and wife, 167.
 - Accessory not restricted to proof of facts that were not shown on trial of principal, 167.
 - In New York, original minutes of Court are proper evidence against an accessory before the fact, 167.
 - But rough minutes not approved by the Court. *Note*, 167.
- Private persons aiding or opposing officers of justice, homicide by, 71.
- Prize-fighters, death caused by. See "*Negligent Homicide.*"
- Provocation.
 - 1st. Words, gestures, and other light provocations, 168.
 - (1.) Where the intent is to kill.
 - No provocation can excuse or justify; the most it can do, is to render the offence manslaughter, 168.
 - Words of reproach will not free from guilt of murder, 169.
 - nor provoking gestures, without an assault, 169.
 - Intent to be drawn from weapon used, 169.
 - It is proper to instruct the jury, that they must consider the weapon used, as well as the degree of deliberation in the question how far the provocation sufficed, 169.
 - Where an assault is made, the crime will be reduced to manslaughter, if the killing be in the heat of blood, occasioned by the provocation, 170.
 - Words of menace of bodily harm, not sufficient, 170.
 - If A. give indecent language to B., and B., thereupon, strike A., but not mortally; and then A. strike B. again, and then B. kill A.; it seems that this is manslaughter, 170.
 - Selfridge's case, commented on, 171.
 - A man attacked by another, under circumstances denoting an intent to kill or do great bodily harm, may lawfully kill assailant, provided he use all the means in his power otherwise to escape, 171.
 - Where the attack is so violent and sudden, that he cannot retreat without danger, he may instantly kill his adversary without retreating at all, 171.
 - Where there is reasonable ground to believe that there is a design to destroy life or commit a felony on the person, killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended, 171.
 - Defendant cannot prove threats against himself, without proving knowledge of them before the killing, 175.
 - Where the intent is only to chastise, 175.
 - It must appear that the punishment was not brutally violent, nor greatly disproportionate to the offence, and the instrument not likely to endanger life, 175.
 - Where a deadly weapon is used, the intent to kill is presumed, 176.

Provocation—(continued.)

- Whether the instrument was improper; and the probable intent was to kill, is to be gathered from the circumstances of the case, 176.
- Throwing a stake at deceased, and striking him on the head, 176.
- Striking person with broomstaff and killing him, 176.
- Where deceased was tied to horse's tail, and then beaten, upon which the horse ran away, 176.
- Beating trespasser on defendant's land, 176.
- Where party threw pickpocket into a pond, whereby he was drowned, 177.
- Dishonour, 171.
 - Cooling time, 177.
 - Whether the homicide be murder or manslaughter, depends upon whether it was committed in the first transport of passion or not, 177.
 - Where a man finds another in the act of adultery with his wife, 177.
 - The killing of adulterer deliberately and upon revenge, is murder, 177.
- Cooling time, and herein of degree, 179.
 - No matter what the provocation, if there have been sufficient time for the passions to subside, and reason to interpose, the homicide will be murder, 179.
 - If husband kill adulterer deliberately and upon revenge, the provocation will not alleviate the guilt, 179.
 - Where a man killed another, who had beaten his son, the day before, 179.
 - The provocation must be recent and strong, and the prisoner, at the moment, not master of his own understanding, 179.
 - Where parties fight upon sudden quarrel, 179.
 - Where they appoint to fight another day, or even the same day after such an interval that the passions might have subsided, 179.
 - To mitigate homicide in second combat by what occurred at previous one; both must be considered as one combat; or the first, a sufficient sudden provocation for the second, 180.
 - Where party has retreated, and is secure, he has no right to return armed, and voluntarily engage in a new conflict, 180.
 - If there be sufficient cooling time for passion to subside, and reason to interpose, it is deliberate revenge, and not heat of blood, and accordingly amounts to murder, 181.
 - Law assigns no limit to cooling time; each case must depend on its own circumstances, 181.
 - Case of Major Oneby, 181.
 - If, between the provocation and the mortal blow, the prisoner fall into other discourse, or pursue any other business not connected with his passion, it is reasonably presumed that reason has interposed, and such killing will be murder, 182.
 - Thought contrivance and design shown by prisoner, 182.
 - Proper question is not whether the suspension of reason continued down to the mortal stroke, but did the prisoner cool, or was there time for a reasonable man to have cooled? 185.
 - The supposition in law is, that a state of violent exasperation is caused, which produces a temporary suspension of reason, and excludes the presumption of malice, 185.
- Trespass, 185.
 - Bare trespass, not against dwelling-house, not sufficient provocation to warrant the use of a deadly weapon, 185.
 - And this, though otherwise such trespass could not be prevented, 185.
 - Intent of the party, where instrument is not likely to kill, material, 185.
 - Where death ensues by the act of one in an unlawful design, without intent to kill, it is murder or manslaughter, as the intended offence was felony or misdemeanor, 186.
 - Party has no right to put another out of his house by force, till after gentler means fail, 186.
- Blows,
 - (1.) Where the parties are equal, 186.

Provocation—(continued.)

If it be resented immediately in the heat of blood upon such provocation, it will be manslaughter, 186.

An unintentional and trivial assault, no palliation, 186.

In a sudden and equal quarrel, it is immaterial by whom first blow is struck, 188.

(2.) Where there is a disparity in strength or weapons, 189.

Trivial provocation no extenuation, 189.

Violent acts of resentment bearing no proportion to the provocation, indicate malice, 189.

In killing a woman or child, for a slight blow, the provocation no justification, 190.

Where disparity exists, as to means of attack and defence, provocation no defence, if undue advantage be taken, 191.

Where persons fight on fair terms with fists, and blows pass, not likely to cause death, it is manslaughter, 192.

And where blows pass, and after an interval, a party draws in heat of blood, a deadly weapon, it is manslaughter, 192.

But if party enter the contest unduly armed, and fight with undue advantage, though blows pass, it is murder, 192.

If, after an interchange of blows, one of the parties, without such intention at commencement of the affray, kills with a deadly weapon hastily snatched up, it will be only manslaughter, 192.

But if a party uses from the beginning a deadly weapon, without the knowledge of the other; or if he prepares deadly weapon so as to have the power to use it, the killing will be murder, 192.

(3.) Where the intent is to kill, 194.

The weapon must be taken into consideration, 194.

If deadly weapon is used, the intent to kill will be inferred, and the provocation must be great, 194.

There must be a reasonable proportion between the provocation and the weapon used, 195.

If a strong man attacks a weak one, though no weapon be used, if, after much injury by beating, the violence is still continued, question whether this does not show brutality, and a purpose to kill; and if so, it is murder, 195.

If persons act together, with common intent, every act done in furtherance of that intent is, in law, done by all, 195.

Blow must be struck on immediate provocation to reduce the crime to manslaughter, 196.

If one seek another, and fight him with intent to stab him, it will be murder, no matter what provocation, 196.

Where two persons, who have formerly fought on malice, and are afterwards apparently reconciled, fight again on a fresh quarrel, the law will not presume the existence of the old grudge, 196.

(4.) Where the intent is to chastise, to determine the intent, the nature of the wound is a proper subject for consideration, 196.

Where party struck deceased with beer pot, making a wound about a quarter of an inch deep, not apparently dangerous, of which deceased died, held manslaughter, 197.

(5.) Where mortal blow is deliberately given, after deceased is disarmed or helpless, 197.

Where a party hold another prostrate and helpless, the killing will be murder, and a prior blow will not mitigate the crime, 197.

In such case the act is so wilful and deliberate, that nothing will justify it, 197.

(6.) Where the attack is sought by the party killing.

The plea of provocation will not avail in any such case, 197.

Even where there have been previous struggling and blows, if there is malice, 197.

(7.) Where the revenge is cruel and unusual.

Nature of the instrument to be considered, 197.

(8.) Where there was an old grudge, 198.

Provocation—(continued.)

- Where a deliberate purpose to kill is discovered, the provocation which immediately precedes the act, is to be thrown out of the case, 198.
- If, upon provocation, one deliberately denounce vengeance against another, or the like, and afterward carry his threat into execution, he will be guilty of murder, 198.
- And that, although the law, apart from such evidence of express malice, might have imputed it to unadvised passion, 198.
- Where one, who has privately and secretly armed himself, in expectation of an assault, and on such assault being made, kills the assailant, though retreating, it is murder, 198.
- Where parties had high words, and a challenge to fight had passed; and three hours afterwards the defendant renewed the challenge, which was accepted, which resulted in the death of other party, it was held murder, 199.
- Where malice in the slayer is ascertained, its continuance to the fatal act, is presumed, unless repelled by evidence, 199.
- Where adversary intercepts one upon his lawful road, and in his lawful business, and he accept the fight, the law will not presume the killing to have been on the ancient grudge, but upon the insult given by stopping the way, and it will be manslaughter, 199.
- If one seek another, under pretence of fighting, to stab him, if death ensue, it will be murder, no matter what provocation, for the malice is express, 199.
- If the old quarrel be reconciled, and afterwards A. and B. fall out on new cause, and A. kills B., this is not murder, 200.
- Otherwise, if reconciliation be pretended, 200.
- In all cases of slight provocation, if it may be reasonably collected from the weapon or other circumstances, that the intent was to kill or do great bodily harm, it will be murder, 201.
- (9.) Where a third party interferes in the combat of others, 201.
- Where such interference is from malice, and not from mere wantonness, it will be murder, if death ensue, 201.
- Where third party interferes from hot blood, it is manslaughter, 201.
- If, when party has retreated as far as he can, his servant kill the assailant, this is homicide *se defendendo*, 202.
- But if master had not retreated as far as he could, it would have been manslaughter in the servant, 202.
- 6th. Restraint or coercion.
- Illegal restraint, under colour of process, will reduce the offence to manslaughter, 203.
- This holds where a man is injuriously restrained of his liberty, as standing at debtor's door with drawn sword, till bailiff come to arrest, 203.
- So where sergeant put a common soldier under arrest, and no authority appeared in the sergeant, 203.

QUICKNESS, evidence of. See "*Evidence.*"

how far essential to constitute abortion a misdemeanor, 390-391, 392-393.

RACING, death by. See "*Negligent Homicide.*"

Recklessness, homicide in consequence of. See "*Homicide.*"

Rescue, homicide in prevention of. See "*Officers of Justice.*"

Residence of defendant, how to be averred. See "*Indictment.*"

Restraint, when a sufficient provocation. See "*Provocation.*"

Revenge, homicide from. See "*Provocation.*"

Riding, negligence in. See "*Negligent Homicide.*"

Riotous homicide.

General law of riots, 344.

When riot merges in treason, 344.

General limits of treason, 344-345.

Responsibility of parties who, though not engaged in overt act, are yet present in the assembly, 345.

Riotous homicide—(*continued.*)

Joint responsibility of rioters, 345.

Collisions of two bands of men, 347.

How far provocation affects the degree in riotous homicide, 350.

Hot blood, 350.

Cooling time, 351.

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Killing third parties, 353.

Grade of offence when homicide occurs in a riot, 352–353.

(See *Appendix*, 460.)SAILOR's duty in shipwreck. See "*Shipwreck.*"

Schoolmaster, improper correction of child, death through, 129.

Seditious meetings. See "*Riotous Homicide.*"Self-defence. See "*Excusable Homicide.*" "*Provocation.*"

Self-murder, 98.

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where two agree to kill themselves, 98.

evidence of. See "*Evidence.*"Self-preservation in shipwreck. See "*Shipwreck.*"Selfridge's case. See *Appendix*, 417.

commented on, 170–175, 213–214.

Servant aiding master, homicide of, 42.

interfering to resist arrest, 91.

Ship's officers, homicide by, 71. See "*Officers of Justice.*"

Shipwreck, self-preservation in.

Upon the authority of Lord Bacon it has been held, that where two persons being shipwrecked, and getting upon one plank, one of them, finding it will not save both, thrust the other from it, whereby he was drowned, it is excusable homicide, 237.

Lord Hale doubts this; since a man cannot excuse the killing of another, who is innocent, under a threat, however urgent, of losing his own life, 237.

Mr. East supports the opinion of Lord Bacon, 237.

In this country, the subject has been under the test of a judicial investigation, and definitely settled. (See Alexander W. Holmes' case,) 237.

New principle introduced into the case by Baldwin, J., 238.

In an emergency, where the life of sailor is of no more value than the life of the passenger, it being the sailor's stipulated duty to save the passenger's life at all hazards, the life of the passenger must be preferred, 238.

If, on the other hand, the full crew was necessary for the management of the vessel, the first reduction ought to take place from the ranks of the passengers, 238.

The proper mode to determine the victim from the particular class, is by ballot, 238.

Charge of Baldwin, J., in the Alexander Holmes' case, 238–239.

"The sailors and passengers are not in an equal position," 239.

"Two sailors may struggle with each other for the plank that can sustain but one; but if the passenger is on it, even the law of necessity justifies not the sailor who takes it from him," 239.

"The captain and such of the seamen as are necessary to the preservation of the boat are not bound to draw lots, for unless these abide, all will perish; but this privilege is founded upon reasons which must not be disregarded; the law does not favour him merely because he is a sailor, it is as the instrument of common preservation," 240.

"When the reason of the exemption ceases, the supernumerary sailor stands without any privilege," 240.

Slave, master obliged to care for, when sick, 128.

Slavery, how affecting homicide, 286.

Homicide of slave by white person, 286.

The wilful and deliberate killing of a slave, murder, 286.

Even though by his master, 286, 287.

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Difference in rule of provocation between whites and blacks, 288, 289.

Homicide of master, or other free person, by slave, 288.

For a slave to kill his master when correcting him is murder at common law, 297.

Where a white man inflicts severe blows on a slave over whom he has no authority, and the latter at the instant kills the assailant, the offence is only manslaughter, 303.

Somnambulism as a defence, 317.

Steam vessels, negligence in navigating. See "*Negligent Homicide.*"

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THIRD PARTIES, killing by mistake, 42, 353, 362-363.

Time and place, how to be averred. See "*Indictment.*"

Tipstaves, homicide of and by. See "*Officers of Justice.*"

Treason. See "*Riotous Homicide.*"

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how far a provocation. See "*Provocation.*"

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Warrant, effect of defects in, or want of, upon arrests, 58-71.

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Weapon, presumptions to be drawn from. See "*Evidence.*" "*Provocation.*" evidence of. See "*Evidence.*"

Wife, death of, by neglect. See "*Negligent Homicide.*"

Words, how far a provocation. See "*Provocation.*"

Workmen, negligence by, causing death. See "*Negligent Homicide.*"

Wounds, presumptions to be drawn from. See "*Evidence.*"

THE END.

